From the Law Offices of
JOHN N. MOHR
Hall Bldg., Hood River, Ore.

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 87

DECISIONS BETWEEN DECEMBER 18, 1917, AND MARCH 19, 1918

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OF THE

SUPREME COURT.

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HENRY J. BEAN.....Associate Justice
GEORGE H. BURNETT.....Associate Justice
HENRY L. BENSON.....Associate Justice
LAWRENCE T. HARRIS.....Associate Justice
WALLACE McCAMANT .....Associate Justice
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*Arthur S. Benson was appointed Clerk February 5, 1918, succeeding Julius C. Moreland, deceased.

*William A. Wiest was appointed Deputy Clerk at Salem, February 7, 1918, succeeding Arthur S. Benson.

DEPARTMENT NO. 1.

JUSTICE HENRY L. BENSON, Presiding Judge.
JUSTICE GEORGE H. BURNETT.
JUSTICE LAWRENCE T. HARRIS.

DEPARTMENT NO. 2.

JUSTICE HENRY J. BEAN, Presiding Judge.
JUSTICE FRANK A. MOORE.
JUSTICE WALLACE MCCAMANT.

THOMAS A. MCBRIDE, Chief Justice.

The Chief Justice, when present, will preside in both departments; in his absence the presiding judge. The Chief Justice at any time may change a justice from one department to the other.

By order of the Chief Justice, a case may be heard by the court sitting *in banc*, either before or after argument. In any case heard before a department, three justices must concur to render a valid judgment.

JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

March 19, 1918.

First Judicial District—

Jackson, Josephine — FRANK M. CALKINS, Medford.

Second Judicial District—

Benton, Douglas — JAMES W. HAMILTON, Roseburg.

Curry, Coos — JOHN S. COKE, Marshfield.

Lane, Lincoln — GEORGE F. SKIPWORTH, Eugene.

Third Judicial District—

Linn — PERCY R. KELLY, Department No. 1, Albany.

Marion — GEORGE G. BINGHAM, Department No. 2, Salem.

Fourth Judicial District—

Multnomah — JOHN P. KAVANAUGH, Department No. 1, Portland.
ROBERT G. MORROW, Department No. 2, Portland.
ROBERT TUCKER, Department No. 3, Portland.
GEORGE W. STAPLETON, Department No. 4, Portland.
WILLIAM N. GATENS, Department No. 5, Portland.
CALVIN U. GANTENBEIN, Department No. 6, Portland.

Fifth Judicial District—

Clackamas — JAMES U. CAMPBELL, Oregon City.

Sixth Judicial District—

Morrow, Umatilla — GILBERT W. PHELPS, Pendleton.

Seventh Judicial District—

Hood River, Wasco — FRED W. WILSON, The Dalles.

Eighth Judicial District—

Baker — GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant, Harney, Malheur — DALTON BIGGS, Ontario.

Tenth Judicial District—
Union, Wallowa } JOHN W. KNOWLES, La Grande.

Eleventh Judicial District—
Gilliam, Sherman, Wheeler } DAVID R. PARKER, Condon.

Twelfth Judicial District—
Polk, Yamhill } HARRY H. BELT, Dallas.

Thirteenth Judicial District—
Klamath ..... DELMON V. KUYKENDALL, Klamath Falls.

Fourteenth Judicial District—
Lake ..... L. F. CONN, Lakeview.

Eighteenth Judicial District—
Crook, Deschutes, Jefferson } T. E. J. DUFFEY, Prineville.

Nineteenth Judicial District—
Tillamook, Washington } GEORGE R. BAGLEY, Hillsboro.

Twentieth Judicial District—
Clatsop, Columbia } JAMES A. EAKIN, Astoria.

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

March 19, 1918.

County.	Name.	Official Address.
Baker	Levens, W. S.	Baker
Benton	Clarke, Arthur	Corvallis
Clackamas	Hedges, Gilbert L.	Oregon City
Clatsop	Judd, Edw. C.	Astoria
Columbia	Metsker, Glen R.	St. Helens
Coos	Hall, John F.	Marshfield
Crook	Wirtz, Willard H.	Prineville
Curry	Buffington, Collier H.	Gold Beach
Deschutes	DeArmond, H. H.	Bend
Douglas	Neuner, George, Jr.	Roseburg
Gilliam	Weinke, T. A.	Condon
Grant	Ashford, Phil.	Canyon City
Harney	Biggs, M. A.	Burns
Hood River	Derby, A. J.	Hood River
Jackson	Roberts, G. M.	Medford
Jefferson	Boylan, Bert C.	Metolius
Josephine	Miller, W. T.	Grants Pass
Klamath	Duncan, William M.	Klamath Falls
Lake	McKinney, T. S.	Silver Lake
Lane	Ray, L. L.	Eugene
Lincoln	Hawkins, Calvin E.	Toledo
Linn	Hill, Gale S.	Albany
Malheur	Swagler, R. W.	Malheur
Marion	Gehlhar, Max	Salem
Morrow	Notson, Samuel E.	Heppner
Multnomah	Evans, Walter H.	Portland
Polk	Piasecki, E. K.	Dallas
Sherman	Huddleston, C. M.	Wasco
Tillamook	Goyne, T. H.	Tillamook
Umatilla	Keator, R. I.	Pendleton
Union	Hodgin, John S.	La Grande
Wallowa	Fairchild, Abijah	Enterprise
Wasco	Galloway, Francis V.	The Dalles
Washington	Tongue, E. B.	Hillsboro
Wheeler	Trill, Wallace G.	Fossil
Yamhill	Conner, Roswell L.	McMinnville

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CASES DECIDED

IN THE

SUPREME COURT

OF

OREGON.

Argued December 4, affirmed December 18, 1917.

BARNES *v.* ESCH.*

(169 Pac. 512.)

Injunction—Trespass—Cutting Timber.

1. Equity will intervene to prevent a trespass upon real property by cutting timber.

Mines and Minerals—Injunction—Removal of Ore.

2. The removal of ore from the premises of another without his consent will be enjoined.

Waste—Injunction.

3. A suit in equity will lie to restrain waste.

Execution—Injunction—Pleading.

4. A complaint in a suit to enjoin the sale of real property upon execution could not be sustained as predicated upon the assumption of a continuing or other trespass; for, since levy of execution upon real property is made under Section 233, subdivision 4, L. O. L., by the sheriff's delivering to the county clerk a certificate containing the title of the cause, the names of the parties to the action, a description of the land, and that the same has been levied upon to satisfy the demand of the judgment creditor, such enforcement of the writ does not imply an entry upon the premises.

Execution—Wrongful Levy—Persons Liable.

5. A seizure by an officer of the property of one not a party to the writ being illegal, when such levy is directed by the party at whose instance the execution was issued, the command renders such party and the officer liable for the damages thus occasioned.

Justices of the Peace—Setoff of Judgments—Statutes.

6. Section 2443 et seq., L. O. L., providing for setting off one judgment against another when given in Justices' Courts, if between the same parties and mutual, evinces a legislative policy, in the absence

*For authorities discussing the question of right to injunction against trespass to cut timber, see notes in 22 L. R. A. 233; 43 L. R. A. (N. S.) 262. REPORTER.

of any statute regulating equitable setoffs in courts of record, of requiring that the demands shall be mutual and exist between the same parties before they can be employed to extinguish, wholly or in part, the rightful claim of the adverse party.

[As to setoff of one judgment against another, see note in 109 Am. St. Rep. 137.]

Setoff and Counterclaim—Setoff of Partners' Claims.

7. Notwithstanding the rule against setoff of partnership demands and demands due to individual partners, where all the partners agree with an individual that a setoff may be allowed, the stipulation will be enforced.

Setoff and Counterclaim—Setoff of Wife's Claim Against Judgment Against Husband.

8. Notwithstanding a wife's natural interest in protecting her husband's rights, the requirement of mutuality of demands prevents her being allowed to offset her claim for damages against a judgment against her husband to which she was not a party, even though the judgment creditor is insolvent and a nonresident of the state.

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This suit was instituted by Grace D. Barnes against Wm. Esch, the then sheriff of Marion County, Oregon, and A. B. Spencer to enjoin the sale of real property upon execution, to recover from Spencer $60,000 as damages for his alleged interference with her lands, and to offset that sum against a judgment which Spencer obtained against her husband, L. S. Barnes. The complaint charges in effect that by consideration of the Superior Court of Los Angeles County, California, Spencer secured a judgment against Mr. Barnes for $69,339, which final determination was obtained by fraud, deceit and false testimony; that based on such recovery Spencer commenced an action in the Circuit Court of Marion County, Oregon, and obtained a duplicate judgment; that by direction of her husband, the plaintiff delivered to him certain funds with which he purchased in such county lands worth $56,250, and bonds of the par value of $3,500, which property was intended to be conveyed and transferred to her, but by

inadvertence the deeds therefor, except to a small part of the premises, were executed and the bonds assigned to him, and since such purchases she has been and now is the owner of the property and entitled to the proceeds thereof; that on March 18, 1913, with knowledge and notice of the plaintiff's title and ownership, Spencer fraudulently caused to be issued on the latter judgment an execution which by his direction Esch levied upon her lands and advertised them for sale, and he also seized such bonds by virtue of the writ; that the plaintiff commenced a suit against Spencer and Esch for a decree declaring her to be the owner in fee of all the real property so levied upon, securing a temporary order restraining the sale of the land, and at the final hearing it was decreed that she was such owner of all the premises, except a tract known as the Burrows property, and particularly described in the case of *Barnes* v. *Spencer,* 79 Or. 205, 221 (153 Pac. 47); that by virtue of the seizure of such bonds, Esch sold them and applied the proceeds on the judgment to plaintiff's damage in the sum of $3,500; that in consequence of Spencer's fraudulent conduct, the plaintiff has been obliged to expend $12,000, in defending her title to the land; that by reason of his clouding the title to her real property she has lost the sales of tracts thereof upon *bona fide* offers in advance of the purchase prices as follows: On the Salem Hotel, $25,750, on the Barker property, $2,750, and on the Hofer property, $1,500, and by reason of Spencer's fraudulent conduct she has been damaged in the sum of $60,000; that believing she was the owner of the Burrows property she expended in improving it, $2,000; that Spencer is a nonresident and has no property in Oregon, except the fraudulent judgment against Mr. Barnes; that Esch has readvertised the Burrows prop-

erty and if he is not restrained he will sell the premises upon execution, and unless Spencer is enjoined, he will continue to annoy and harass the plaintiff and compel her to expend more money in protecting her title to the lands, to her irreparable injury and damage.

The answer denies some of the averments of the complaint, admits others, and for a further defense and by way of estoppel alleges in substance the giving of the judgment in Marion County, Oregon, the issuing thereon of an execution, the levy thereof upon the land, and the seizure of the bonds, whereupon the plaintiff commenced a suit against these defendants, as hereinbefore stated, but in the complaint therein she made no claim to the bonds and by stipulation of the parties such securities were by order of the court, released from the injunction and sold upon execution, with the knowledge of the plaintiff and without her objection, for which reason she ought now to be precluded from asserting any right to or interest in the bonds, or the sum of money derived from the sale thereof.

For another defense it is practically alleged that by the final decree of this court in the case referred to it was determined that plaintiff had no title to or interest in the Burrows land, and a *remittitur* of record having been sent to and recorded in the trial court, pursuant thereto the sheriff readvertised that real property for sale under the execution, which writ had been held in abeyance pending the final decree, whereupon this suit was instituted, and that by reason of the matters here stated such final decree as to the Burrows land had become *res judicata*, thereby barring plaintiff from maintaining this suit.

The reply having put in issue the allegations of new matter in the answer, the court upon motion of defendants' counsel, that the complaint did not state facts

sufficient to warrant equitable intervention, gave a decree upon the pleadings, dismissing the suit and the plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Grant Corby.*

For respondents there was a brief over the names of *Mr. Oscar Hayter, Mr. Woodson T. Slater* and *Mr. Myron E. Pogue,* with an oral argument by *Mr. Hayter.*

MR. JUSTICE MOORE delivered the opinion of the court.

A statement in the brief of plaintiff, reads:

"This is a suit to enjoin a continuing trespass and to secure a setoff of a claim for damages against a judgment obtained against plaintiff's husband, L. S. Barnes, by fraud, deceit and false testimony, which said defendant Spencer attempted to enforce by execution and levy against a large amount of property in Marion and Clackamas Counties owned by the plaintiff."

1–3. In *Bileu* v. *Paisley,* 18 Or. 47, 49 (21 Pac. 934, 4 L. R. A. 840), Mr. Chief Justice THAYER referring to 3 Blackstone's Com. 209, describes a trespass as follows:

"Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close."

Equity will intervene to prevent a trespass upon real property by cutting timber: *Kitcherside* v. *Myers,* 10 Or. 21; *Mendenhall* v. *Harrisburg Water Co.,* 27 Or. 38 (39 Pac. 399). The removal of ore from the premises of another without his consent will be enjoined: *Allen* v. *Dunlap,* 24 Or. 229 (33 Pac. 675); *Bishop* v. *Baisley,* 28 Or. 119 (41 Pac. 937); *Muldrick* v. *Brown,* 37 Or. 185 (61 Pac. 428). A suit in equity

will lie to restrain waste: *Sheridan* v. *McMullen,* 12 Or. 150 (6 Pac. 497); *Elliott* v. *Bloyd,* 40 Or. 326 (67 Pac. 202); *Roots* v. *Boring Junction Lumber Co.,* 50 Or. 298 (92 Pac. 811, 94 Pac. 182). In each of these cases the party charged with the commission of a trespass had unlawfully done or threatened the perpetration of some act that resulted in irreparable injury, or was detrimental to the estate of the owner in the premises: *Mendenhall* v. *Harrisburg Water Co.,* 27 Or. 38 (39 Pac. 399); *Union Power Co.* v. *Lichty,* 42 Or. 563 (71 Pac. 1044). In *Mathews* v. *Chambers Power Co.,* 81 Or. 251 (159 Pac. 564), it was held that equity would prohibit a willful trespass upon land. To the same effect see *Chapman* v. *Dean,* 58 Or. 475 (115 Pac. 154).

A careful examination of the averments of the complaint herein fails to show that either of the defendants had ever entered upon the plaintiff's land, or done or threatened the commission of any act that might result in injury to her estate in the premises. No trespass, continuing or otherwise, is charged nor are any facts stated in the initiatory pleading from which an unauthorized entry upon the plaintiff's land can be inferred.

The complaint does allege, however, that the defendant Spencer is a nonresident and has no property in Oregon that is subject to execution, except the judgment which he secured against the plaintiff's husband. In a suit to enjoin a trespass an averment in the complaint that the defendant is insolvent has been held insufficient of itself to authorize equitable intervention: *Parker* v. *Furlong,* 37 Or. 248 (62 Pac. 490); *Moore* v. *Halliday,* 43 Or. 243 (72 Pac. 801, 99 Am. St. Rep. 724); *Hume* v. *Burns,* 50 Or. 124 (90 Pac. 1009).

4. As the levy of an execution upon real property is made by the sheriff delivering to the county clerk a

certificate containing the title of the cause, the names of the parties to the action, a description of the land, and that the same has been levied upon to satisfy the demand of the judgment creditor (Section 233, subd. 4, L. O. L.) such enforcement of the writ does not imply an entry upon the premises of the judgment debtor, or of any other person, and for that reason this suit cannot be predicated upon the assumption of a continuing or other trespass.

5. It is argued by plaintiff's counsel that the levy of an execution upon the property of a person who is not a party to the judgment upon which the writ was issued, entitles such owner to compensatory damages, which measure of loss may be set off in equity against the demand of the judgment creditor who caused the injury, if he be insolvent and not a resident of the state. A seizure by an officer of the property of a person who is not a party to the writ is illegal. When such levy is directed by the party at whose instance the execution was issued, the command renders such party and the officer liable for the damages thus occasioned: *Meyer* v. *Gage,* 65 Iowa, 606 (22 N. W. 892); *Perrin* v. *Claflin,* 11 Mo. 13; *Knight* v. *Nelson,* 117 Mass. 458; *First Nat. Bank of Chillicothe* v. *McSwain,* 93 S. C. 30 (75 S. E. 1106 (Ann. Cas. 1914D, 809).

A text-writer in discussing equitable cross-demands as a means of relief, remarks:

"So proceedings under a judgment will be restrained upon the ground of an equitable setoff, even though for unliquidated damages, where the one against whom it is claimed is a nonresident and insolvent": 1 High, Inj., (4 ed.), § 239.

To the same effect see *Marshall* v. *Cooper,* 43 Md. 46; *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.,* 152 U. S. 596 (38 L. Ed. 565, 14 Sup. Ct.

Rep. 710). See, also, the extended notes to the case of *St. Paul etc. Trust Co.* v. *Leck,* 57 Minn. 87 (58 N. W. 826, 47 Am. St. Rep. 576). In *Mitchell* v. *Holman,* 30 Or. 280 (47 Pac. 616), it was decided that equity would entertain a suit to compel the allowance of a setoff against a judgment on a promissory note obtained by a person who held it only as collateral for a debt less than the amount of the note, where such latter fact was not pleaded because it was not known to the maker until the trial of the law action, and the payee was insolvent.

6, 7. Our statute provides for setting off one judgment against another when such final determinations are given in Justices' Courts, if the adjudications are between the same parties and mutual: Section 2443, et seq., L. O. L. Though this enactment relates to judgments rendered by an inferior tribunal in actions at law, it evinces a legislative policy, in the absence of any statute regulating equitable setoffs in courts of record, of requiring that the demands shall be mutual and exist between the same parties before they can be employed to extinguish wholly or in part, the rightful claim of the adverse party. Such rule has been enforced in other jurisdictions. Thus in a note to the case of *Duncan* v. *Bloomstock,* 2 McCord (S. C.), 318 (13 Am. Dec. 728, 729), it is said:

"The doctrine of setoff, as applied to judgments, rests upon different grounds from that which controls where there are mutual demands which have not passed into judgment. In the latter case the power of a court of law to allow a setoff is derived entirely from the statutes of setoff: See note to *Gregg* v. *James,* 12 Am. Dec. 151. But the law courts have long exercised an equitable power, incidental to their jurisdiction over their suitors and officers, and entirely independent of any statute setting off mutual judgments against each other."

In *Collins* v. *Campbell,* 97 Me. 23 (53 Atl. 837, 94 Am. St. Rep. 458, 462), it is said:

"Mutuality is implied in the word 'setoff,' which has been adopted as a legal term by the legislatures and courts, and is essential in every case dependent upon the discretion of the court, but it need not be a nominal mutuality indicated by the record, but real mutuality shown by the evidence."

In *Priest* v. *Dodsworth,* 235 Ill. 613 (85 N. E. 940, 14 Ann. Cas. 340), it was ruled that a plea proposing to set off an individual demand of one of two defendants against a joint demand of the plaintiff against both defendants was bad, since demands to be the subject of setoffs, must be mutual between all the parties to the action. In *Edmondson* v. *Thomasson,* 112 Va. 326 (71 S. E. 536, Ann. Cas. 1913A, 1301), it was held that partnership demands and demands due to individual partners, could not be set off against each other. A conclusion to that effect is based on the assumption that the liability of partners is joint and not several, hence a partnership debt cannot be set off against the claim of a partner individually: *Stewart* v. *Terwilliger,* 177 Mich. 313 (143 N. W. 17, Ann. Cas. 1915C, 808). In *Schade* v. *Muller,* 75 Or. 225, 230 (146 Pac. 144), it is said:

"The defendant cannot set off against the plaintiff's demand any claim he may have against a member of the firm."

Where, however, all the partners agree with an individual that a setoff may be allowed, the stipulation will be enforced: *McDonald* v. *Mackenzie,* 24 Or. 573 (14 Pac. 868).

8. The relationship existing between the plaintiff and her husband is not that of a partnership, but they have been here treated as sustaining a somewhat analogous

association. As a loyal wife the plaintiff must be vitally interested in protecting the rights of her husband, but the most favorable situation that can be invoked in her behalf cannot render her alleged claim for damages mutual, or entitle her to offset such demand against the defendant's judgment to which she was not a party, even though the defendant may be insolvent and is a nonresident of this state.

Believing that a proper conclusion was reached in dismissing this suit, it follows that the decree should be affirmed and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE MCCAMANT concur.

Argued December 11, affirmed December 27, 1917.

CRITES *v.* WILLAMETTE VALLEY LUMBER CO.*

(169 Pac. 339.)

Master and Servant—Contract of Master to Furnish Medical Services—Duty of Servant.

1. Where a lumber company posted notice that it charged employees with a hospital fee of 75 cents a month after the first three days' employment, etc., and an employee paid the specified fees, there was a complete contract, requiring the company to furnish the services of its physician to the employee under the circumstances specified in the notices; it was the duty of the employee to apply for such services before employing another physician, and his duty to use reasonable diligence to find the company's physician and request his services before employing another, and if he failed to use such diligence he cannot hold the company liable for sums paid another physician.

Master and Servant—Contract to Furnish Servant With Medical Services—Diligence of Servant to Find Company's Physician—Question for Jury.

2. Whether or not the employee used such diligence was a question of fact for the jury to determine.

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*On liability of master for medical attendant engaged by employee, who by the contract of employment was entitled to such attendance, see note in 37 L. R. A. (N. S.) 757. REPORTER.

Master and Servant—Employer's Contract to Furnish Medical Services —Duty of Servant.

3. If an employee requiring the services of the employer's physician, the employer having contracted to furnish medical services, is ignorant as to who the physician is, it is his duty to inquire and ascertain same from the employer, or, when the name and place of business or residence of the physician is known, the employee should apply where it is reasonable to suppose the doctor may be found.

Master and Servant—Contract of Master to Furnish Medical Services —Diligence of Servant or Wife.

4. Where the wife of the employee of a lumber company which had contracted to furnish him medical services, when he was attacked by appendicitis, went at 8 in the morning to the residence of the company's physician, and learned he was out of town, at 1:30 in the afternoon went to a neighbor's house and telephoned the doctor's residence, but was again informed that he was absent, and, being a trained nurse, and becoming alarmed at her husband's condition, then called in another doctor, who operated, there was no lack of diligence on the part of the employee or his wife, in attempting to secure the attendance of the employer's physician, such as would preclude recovery from the employer of the fees paid the other doctor.

Master and Servant—Contract to Furnish Servants Medical Attention —Breach—Liability.

5. Where an employer, which contracts for consideration to furnish medical attention to its servants, holds out to them a particular person as its physician, and an employee uses reasonable diligence to secure his services in an illness, finds him absent, and, after waiting a reasonable time for his return, employs and pays another physician, the employer must reimburse him for the payment thus made to the other physician.

[As to liability of master for failing to furnish medical aid to injured servant, see note in **Ann. Cas.** 1915D, 507.]

Master and Servant—Contract to Furnish Medical Attendance to Servants—Action for Breach—Evidence.

6. In a servant's action against his employer, which had contracted to furnish medical attendance in case of illness, for fees paid a physician other than the employer's, the latter having been absent when the servant was attacked by appendicitis, testimony of another employee that on several occasions when injured he had gone to the office of the employer's physician and found him absent, and was not directed to apply to any other physician, was properly admitted to show that the custom of the doctor, to which he testified, of keeping an attendant at his office, who, in his absence, made arrangements for the proper treatment of his patients, had not always been observed.

Appeal and Error—Harmless Error—Evidence.

7. In such action, the admission of testimony of the servant's wife as to what occurred between her and the doctor's wife when the servant's wife inquired for the doctor at the family residence, if erroneous, was harmless.

From Polk: HARRY H. BELT, Judge.

This is an action by D. W. Crites against the Willamette Valley Lumber Company, a corporation, to recover for money expended for services of a physician, while in the employ of defendant. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

Department 1. Statement by MR. CHIEF JUSTICE McBRIDE.

This was an action for money expended by plaintiff under the following circumstances: The defendant operated a sawmill at Dallas, Oregon, and the plaintiff at the time of the occurrences hereinafter indicated and for some time previous thereto, was in the employ of defendant as a sawfiler, and during the time plaintiff was so employed by defendant, the following notices were kept posted in conspicuous places within the building where plaintiff worked:

"NOTICE.

"This company charges a hospital fee of 75 cents per month, or any part thereof, after first three days' employment.

"In consideration of this fee, each employee is entitled to full medical and surgical attendance and necessary medicines and appliances for the treatment of any injuries or sickness, with full hospital care, for a period not to exceed sixty days for injuries, and thirty days for sickness. All medical and surgical attendance to be furnished by the company physician or surgeon.

"It is understood by all parties concerned that this agreement does not apply to accidents or sickness that may occur to employees of this company when not engaged in the services of the company.

"NOTICE.

"To comply with the Industrial Commission law or 'Compensation Act' and for the purpose of continuing Doctor and Hospital service for sickness. Beginning July 1st, 1914, the following Hospital fee will be charged by this company. Minimum charge 25 cents. 3 days employment or over 75 cents. For men earning less than $50.00 in any month 75 cents per month. For men earning over $50.00 in any month $1.00 per month. Out of all Hospital fees deducted as above the company will pay to the State Industrial Commission all fees without further charge to employees."

The plaintiff was employed at more than $50 a month and regularly paid the sum of $1 per month as required by the above notices. On the morning of April 27, 1915, at about 2 o'clock, the plaintiff became dangerously ill from an attack of appendicitis, and at 8 o'clock A. M. his wife went to the residence of Doctor Starbuck, the company's physician, to secure his services in the case but was informed by the doctor's wife that he was absent at Black Rock, some 16 miles from Dallas. At 1:30 P. M. plaintiff's wife went to a neighbor's house and called up Dr. Starbuck's residence over the telephone, and was again informed that the Doctor was absent. Becoming alarmed concerning plaintiff's condition, plaintiff's wife called in Dr. Bollman, a surgeon residing in Dallas, who performed an operation on plaintiff and thereafter continued to treat the case, for which services plaintiff paid Dr. Bollman the sum of $125.

It appeared from the evidence that Dr. Starbuck was known to the employees as the company physician and in that capacity had treated plaintiff on previous occasions, and it is admitted in the pleadings that he was such physician. Plaintiff demanded of defendant

the repayment of the money he had paid to Dr. Bollman, and upon defendant's refusal to pay the sum demanded, brought this action. Other facts appear in the opinion. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Oscar Hayter.*

For respondent there was a brief over the name of *Messrs. Smith & Shields,* with an oral argument by *Mr. Roy F. Shields.*

1–3. The following facts and the legal conclusions resulting therefrom may be taken as indisputable. First, that the notice posted by the defendant and the payment by plaintiff to it of the fees specified, constitute a complete contract requiring defendant to furnish the services of its physician to plaintiff under the circumstances mentioned. Second, that it was the duty of plaintiff to apply for such service before employing another physician. Third, it was the duty of the plaintiff to use reasonable diligence to find the company physician and request his services before employing another physician, and if he failed to use such diligence he cannot hold the defendant. Whether or not he used such diligence was a question of fact for the jury to determine. If the party requiring the services of a physician is ignorant as to who the physician is, it is his duty to inquire and ascertain from the company that employs him; but when the name and place of business or residence of the physician is known, the injured party should apply at the place where, under all the circumstances, it is reasonable to suppose the doctor may be found.

In the case at bar it appears that Dr. Starbuck had an office and a young lady attendant whose custom it

was to advise patients of his whereabouts when absent, and it also appears that his telephone was so connected with the telephone of an adjoining drug-store, that any call for his office also rang up the drug-store, and that it was the custom of those employed in the drug-store to answer such calls in the doctor's absence and give such information as to his whereabouts as might be necessary. It is not shown that plaintiff knew of either of these arrangements and it appears that he had no telephone in his home.

4. Under the circumstances we are not prepared to say that there was any such lack of diligence on the part of plaintiff, or his wife, as will preclude a recovery. The first attempt to get Dr. Starbuck was made at 8 o'clock in the morning, at which hour of the day it would be only reasonable to assume he would be at his residence rather than at his office. Here plaintiff's wife was informed that the doctor was out of town, so it might reasonably appear to Mrs. Crites, who is not known to have been aware of the doctor's arrangement with the attendant or the drug-store people, that it would be useless to apply at the office, and the same is true with respect to her second call in the afternoon. It is true that Mrs. Crites might have gone to the mill office and discussed the situation with its officers, but it is shown that previous to her marriage she had been for several years a trained nurse, and even if such a course had been suggested to her it is not likely that she, or anyone else acquainted with the dangerous nature of the disease from which plaintiff was suffering, would have delayed longer and taken chances on plaintiff's life while red tape was being unwound in the matter of securing the services of a physician. The testimony concerning plaintiff's

condition indicates that Dr. Bollman's services were invoked none too soon.

There is no rule for the construction of this species of contracts different from the rules that apply generally to all contracts. So far as the defendant is concerned, it is in writing and by its terms the defendant promised absolutely to furnish plaintiff the services of its physician in case of sickness or injury. It was not a contract to furnish the services of its physician in the event he could be reached or was available, but to furnish his medical services when needed. It was not a charity service, such as figures in some of the cases cited by counsel for defendant; neither was it a contract to administer a trust fund for the benefit of persons subscribing thereto, which is described in other cases cited. It was a plain open agreement that in consideration of 75 cents per month paid by the employee, the employer would furnish him the services of its physician when needed. It is not probable that the sum paid by employee would exceed the cost of the service to be rendered, but such a condition is possible and in that case or in any case, the amounts paid by the employees went directly into the treasury of the company and was as much its money as the cash it received for lumber. None of the Oregon cases cited are hostile to this doctrine.

In *Miller* v. *Beaver Hill Coal Co.*, 48 Or. 136 (85 Pac. 502), it appeared that the defendant company retained from the wages of its employees the sum of $1.50 a month "for the hospital" and had a hospital at its mine. Mr. Chief Justice BEAN, after stating the testimony, said:

"We are of the opinion it falls short of proving a contract by the defendant to provide the plaintiff with necessary medical and surgical attendance in case of

injury. It merely shows that a certain sum each month was contributed by the plaintiff and his fellow employees, or exacted by the company, for the support and maintenance of a hospital for the use of the employees. There is no evidence that any statement or promise was made by the defendant to the plaintiff, or any of its employees, as to the object and purpose of the contribution or the benefit they would receive therefrom, other than it was for hospital purposes. The transaction, therefore, under the testimony, constituted in law nothing more than a subscription by the plaintiff and the other employees for charitable purpose of maintaining a hospital, where they could obtain such medical attendance and hospital accommodations as the fund thus subscribed would afford."

In the case at bar the contract supplies the very element necessary to justify a recovery, which was lacking in the case cited, namely: a promise on the part of the company collecting the money to furnish the services.

In *Jackson* v. *Pacific Coast Condensed Milk Co.*, 61 Or. 158 (120 Pac. 1, 37 L. R. A. (N. S.) 757), the contract of employment was as follows:

"George Jackson, No. 54, enters the employ of the Pacific Coast Condensed Milk Co. as gen'l help, to be rated at 15¢ per hour from June 9, 1908; 50¢ per month to be deducted for Hospital Fund. Payment for each month's labor to be made on the 12th day of the following month. I agree to the above.

"(Signed) GEORGE JACKSON.
"H. H. STEWARD, Supt."

It was held this created a liability on the part of the defendant to the extent of the fund on hand. This conclusion would seem to follow naturally from the very terms of the agreement.

It is useless to discuss further the decisions of courts of other jurisdictions. They vary as the terms of the

agreements vary, and are not at all harmonious even where the agreements are the same. We do not wish to be understood as holding that under all circumstances it is obligatory upon the employer to have a physician at hand at the very hour or minute his services are required, or be responsible for the services of some other physician which the employee may secure. The right to apply to another physician must depend upon the circumstances and the urgency of the case. A man with a boil upon his person might reasonably wait for a day for the service of a doctor, while one suffering from a severe attack of appendicitis would be rash to wait a single hour. The "rule of reason" applies here, as in all cases of a similar character.

The defendant in effect undertook that it would furnish the services of its physician when needed. It did not and could not furnish such services by reason of the fact that the physician was away and not immediately available. The plaintiff used what the jury found was reasonable diligence to get him and failing to do this, employed and paid another physician to do his work. To say that having bought and paid the company for this service in advance, he should be required to pay for it a second time and stand the loss, because the company was not in a position to furnish it, would not be just and would be to apply to this contract a rule not applied to other contracts. A contracts with B to deliver to him when he shall require it, 100 bushels of wheat and B pays for the wheat. When B requires the wheat it is found that A's granary has been destroyed and he has no wheat on hand with which to fulfill his contract. Whereupon B's demand being urgent he buys it elsewhere. Shall he not have compensation from A for this second outlay? Surely.

A restaurant-keeper contracts to furnish a customer with three meals a day for a week and takes his pay in advance. His employees strike and he finds himself at the middle of the week unable to furnish the meals. Must the customer go hungry until the strike is settled or the restaurant-keeper gets new help under penalty of losing what he has already paid if he eats at some other place? A hundred similar examples of every-day occurrences might be cited to illustrate the argument.

5. While a contract for a consideration to furnish one medical attention in the future is not technically one of insurance, it has many features in common with that species of contracts. Where it holds out a particular person to its employees as its physician, and such employee uses reasonable diligence to secure his services, finds him absent and after waiting a reasonable length of time for his return employs and pays some other person to perform the services which the employer contracted that the employee should receive at the hands of its surgeon, it is fair and just that such services should be paid for by the party who for a consideration guaranteed that they should be rendered by a person employed by it, and we so hold.

6. Another assignment of error relates to the admission on rebuttal testimony by another employee of defendant which was to the effect that upon several occasions when injured in the course of his employment, he had gone to Dr. Starbuck's office and found him absent, and was not directed to apply to any other physician for relief. This testimony was, we think, properly admitted. Dr. Starbuck, as a witness for the defendant, testified that he kept an attendant at his office who in his absence made all arrangements for the proper treatment of patients applying therefor. It would

seem clearly competent to show by testimony of the character indicated that such custom had not always been observed: *Hunt* v. *Lowell Gas Light Co.*, 3 Allen (85 Mass.), 418; *Hudson* v. *Houser*, 123 Ind. 309 (24 N. E. 243).

7. Another assignment relates to the admission of certain testimony of Mrs. Crites as to what occurred between her and Mrs. Starbuck upon the occasions when she inquired for the doctor at the family residence. Upon redirect examination counsel for plaintiff asked witness the following question: "During this conversation to which counsel referred on cross-examination, that you had with some one at Dr. Starbuck's residence, was there any directions given to you as to what should be done during his absence?" To which the witness answered "No." Counsel for defendant moved to strike out the answer but the court overruled the motion, saying that he would admit it as having a bearing upon the diligence used by plaintiff to ascertain the whereabouts of Dr. Starbuck. It is difficult to see that it had any such bearing and it is equally difficult to see, taking into consideration the answer given, how it could possibly have prejudiced defendant's case. If error at all it was harmless and the judgment should not be reversed on account thereof.

Taken as a whole we are of the opinion the case was fairly tried and the verdict and judgment such as should have been rendered. The judgment is affirmed.

AFFIRMED.

MR. JUSTICE BEAN, MR. JUSTICE HARRIS and MR. JUSTICE BENSON concur.

Argued on demurrer November 7, petitioner discharged December 27, 1917.

HALL *v.* JOHNSON.*

(169 Pac. 515.)

Municipal Corporations—Ordinances—Validity.

1. A municipal ordinance directed against conspiracies to injure trade, business or commerce, and providing a penalty for violation thereof, has no extramural effect, is not invalid on the ground that it is not local, special and municipal legislation.

Municipal Corporations—Ordinances—Rules of Evidence—Validity.

2. While the legislature may declare that certain evidentiary facts shall be *prima facie* evidence, such facts must have some direct and logical tendency to prove the antecedent fact, hence a municipal ordinance declaring that if any person shall alone, or in company with others, loiter or parade back and forth in front of or cause any other person or persons to loiter or parade back and forth in front of, or in the vicinity of, any store, factory, works or place of business, or in front of, or in the vicinity of, the home of any person connected with, employed in or seeking employment in any such store, etc., such conduct shall be *prima facie* evidence of a conspiracy to injure the trade, business or commerce of the proprietor of the store, etc., thus patrolled, is invalid, because the acts have no tendency to prove a conspiracy to injure the commerce or trade of any person.

Constitutional Law—Ordinances—"Conspiracy to Injure Trade, Business or Commerce"—"Strikes"—"Boycott"—"Picketing."

3. A municipal ordinance defined conspiracies to injure trade, business or commerce as any combination or agreement between two or more persons not to buy from or sell to, or have dealings with any person or persons, or to induce or attempt to induce other persons not to buy from or have dealings with any person or persons, etc., for the purpose or with the intent to compel or force employment or discharge from his employment. The ordinance further declared that if any person alone or in company with others shall carry or display, or cause to be carried or displayed, print or circulate, or cause to be printed or circulated, any banner, sign, etc., which by its terms directly or indirectly induces or attempts to induce others not to buy from or sell to or have dealings with any designated person, or shall loiter or parade back and forth, or cause any person or persons to loiter or parade back and forth, in front of, or in the vicinity of, any store, etc., such conduct shall be *prima facie* evidence of a conspiracy to injure the trade or business of the person or persons referred to by the banner, etc., or whose property is thus patrolled. A "strike" is defined as the act of a body of workmen employed by the same master in stopping work all together at a prearranged time, and refusing to continue until some concession is granted by the employer, while a "boycott" is defined as a combination to cause a loss to one person by coercing others against their will to withdraw from him their business intercourse, by threats that unless others do so, the combination will cause

*Authorities discussing the legality of picketing are collated in notes in 4 **L. R. A. (N. S.)** 302; 50 **L. R. A. (N. S.)** 412.

On lawfulness of boycott by other than labor union, see note in 33 **L. R. A. (N. S.)** 1034. REPORTER.

similar loss to them. *Held*, that the ordinance, even though valid as applied to "picketing," which is defined as posting members of a trade union on a strike at all the approaches to works for the purpose of observing or reporting the workmen going to or coming from the works, and of using such influence as may be in their power to prevent the workmen from accepting work there, it is invalid in depriving workmen of their right to strike *en masse;* that right having been recognized for many years.

[As to strikes and strikers, and what is unlawful interference or intimidation, see note in 61 Am. St. Rep. 706.]

Criminal Law—Prohibition—Nature of Acts Which can be Prohibited.

4. It is fundamentally true that whatever may be enjoined by a court of equity may by legislation be declared *malum prohibitum*.

Original proceeding in Supreme Court.

Petition by Earl Hall against N. F. Johnson, as Chief of Police of the City of Portland, for a writ of *habeas corpus*. Hearing upon demurrer to the petition and plaintiff discharged. The facts involved are set forth in the opinion of the court. Petitioner discharged.

For the plaintiff there was a brief with oral arguments by *Mr. W. S. Uren* and *Mr. Charles E. S. Wood*.

For defendant there was a brief with oral arguments by *Mr. Walter P. La Roche*, City Attorney, and *Mr. Stanley Myers*, Deputy City Attorney.

As *amicus curiae* there was a brief and an oral argument by *Mr. Harold M. Sawyer*.

In Banc. MR. JUSTICE BENSON delivered the opinion of the court.

This is an original proceeding based upon petition for a writ of *habeas corpus*. The petitioner was convicted in the municipal court of the City of Portland of a violation of an ordinance which reads as follows:

"Ordinance No. 33033.

"An ordinance defining conspiracies to injure trade, business or commerce, and providing a penalty for the violation thereof.

"The City of Portland does ordain as follows:

"Be it enacted by the people of the City of Portland as follows:

"Section 1. A conspiracy to injure the trade, business or commerce of any person doing business in the City of Portland is hereby defined as any combination of, or agreement between, two or more persons:

"(a) Not to buy from, or to sell to, or have dealings with, any person or persons in the City of Portland; or "(b) To induce, or attempt to induce, others not to buy from, sell to, or have dealings with, any person or persons in the City of Portland; for the purpose or with the intent to prevent any person from employing any person, or for the purpose or with the intent to compel or force any person to employ or discharge from his employment anyone, or to compel or force any person to alter his mode of carrying on his business, or to limit or increase the number of his employees, or their rate of wages or their time of service.

"Section 2. It shall be unlawful for any person to enter into, assist or participate in any conspiracy to injure the trade, business or commerce of any person doing business in the City of Portland, and upon conviction of a violation of this ordinance in the Municipal Court of the City of Portland, such persons shall pay a fine of not less than ten dollars nor more than five hundred dollars, or be imprisoned in the city jail for not less than five days nor more than six months, or shall be both fined and imprisoned.

"Section 3. If any person shall, alone or in company with others:

"(a) Carry or display, or cause to be carried or displayed, print or circulate, or cause to be printed or circulated any banner, sign, transparency, writing, printing, dodger, card, notice, sticker, button or sash, which by its terms or appearance, directly or indirectly induces or attempts to induce others not to buy from, sell to, or have dealings with, any designated person or persons doing business in the City of Portland; or

"(b) Loiter or parade back and forth, or cause any other person or persons to loiter or parade back and forth in front of or in the vicinity of any store, factory, works or place of business in the City of Portland, or in front of or in the vicinity of the home of any person in the City of Portland connected with, employed in, or seeking employment in, any such store, factory, works or place of business; such conduct shall be *prima facie* evidence of a conspiracy to injure the trade, business or commerce of the person or persons designated or referred to by or in any such banner, sign, transparency, writing, printing, dodger, card, notice, sticker, button or sash or of a conspiracy to injure the trade, business or commerce of the proprietor of the store, factory, works, or place of business, whose premises or home, or the home of whose employees or of those seeking employment in his store, factory, works or place of business, shall have been thus patrolled, and shall also be *prima facie* evidence of participation in such conspiracy by the person so conducting himself.

"Section 4. The words 'any person doing business in the City of Portland,' 'any person,' 'anyone' and 'proprietor' whenever used herein, shall include the plural as well as the singular, individuals of either sex, and also any partnership, association, domestic or foreign corporation or joint stock company."

1, 2. The questions presented for our consideration involve the validity of the ordinance under which the petitioner is imprisoned. An analysis of the ordinance discloses that it consists of: (1) A definition of what is to be deemed to constitute a conspiracy to injure the trade, business or commerce of any person doing business in the City of Portland; (2) declaring such conspiracy a crime and fixing the punishment; (3) enumerating certain acts the performance of any one of which is to be *prima facie* evidence of such a conspiracy. It will be at once noted that this legisla-

tion in effect makes it unlawful for workmen to strike, or to solicit others to strike, or to solicit others from accepting employment from any person doing business in the City of Portland. By Section 3, picketing is made *prima facie* evidence of the substantial offense. It is urged that this is not local, special and municipal legislation within the terms of the state Constitution, but we are unable to concede this point, since its influence is limited to the municipality by which it was enacted and it could not in any event have an extramural effect. It is contended that it is an attempt by a local law to regulate the practice in courts of justice, in setting aside the legal presumption of innocence, by declaring what evidence shall be proof of guilt, without regard to whether such evidence satisfies the court or jury beyond a reasonable doubt that the accused is guilty. This point is of course aimed at Section 3 of the act. There are a few authorities which appear to support this contention, but the great weight of authority is opposed to it, and this court has definitely adopted the other view. In a case recently decided by this court, *Elliott* v. *Tillamook County,* 86 Or. 427 (168 Pac. 77), Mr. Justice MOORE says:

"The legislature in prescribing rules governing the trial of civil causes, may enact that certain resulting evidentiary facts related to, and having a tendency to establish the existence of some preceding fact can properly declare that the subsequent fact affords *prima facie* evidence of the antecedent fact, and such enactment will be upheld, notwithstanding the burden of proof is thereby shifted to the adverse party, since he is not concluded thereby, but may introduce evidence tending to rebut the disputable presumption thereby created."

Again, in *State* v. *Randolph,* 85 Or. 172 (166 Pac. 555), a criminal case, Mr. Justice HARRIS says:

"No additional force is given to the contention of the defendant when it is argued that the act of 1915 changes prior rules of evidence. The state has the power to alter rules of evidence. Stated in general terms, the accepted rule is that a person does not have a vested right in a rule of evidence; and therefore the legislature has power to alter or create any rule of evidence so long as it leaves a party a fair opportunity to establish his case or defense, and give in evidence all the facts legitimately bearing on the issues in the cause."

The following cases sustain the doctrine: *State* v. *Hamilton,* 80 Or. 562 (157 Pac. 796); *State* v. *Kline,* 50 Or. 426 (93 Pac. 237); *State* v. *Fisher,* 53 Or. 38 (98 Pac. 713). However, the power of the law-making body is limited in this respect, in that the facts declared to be *prima facie* evidence must have some direct and logical tendency to prove the antecedent fact, and when subjected to this test, it will be seen that subdivision (b) of Section 3 of the ordinance under consideration is subject to the criticism that, standing alone, the acts there recited have no logical tendency to prove the crime defined in the preceding sections and this paragraph is therefore invalid.

3. It is next urged that the ordinance is unconstitutional because it is an unreasonable invasion of personal liberty and private rights, and is in conflict with the well-defined public policy of this state and of the United States, and this contention presents the serious question for our consideration. This legislation was frequently referred to in the argument as an "anti-picketing ordinance," but we must not lose sight of the fact that it is very much more than that. Disregarding the structural character of the enactment, and seeking for its purpose and import, we observe that it is so designed as to prohibit strikes, boycotts

and picketing. The sense in which we shall use the word "strike" herein is found in Black's Law Dictionary in these words:

"The act of a body of workmen employed by the same master, in stopping work all together at a prearranged time, and refusing to continue until higher wages or shorter time, or some other concession is granted to them by the employer."

A "boycott" has been defined as:

"A combination to cause a loss to one person by coercing others against their will to withdraw from him their beneficial business intercourse, by threats that unless those others do so, the combination will cause similar loss to them, or by the use of such means as the infliction of bodily harm on them, or such intimidation as will put them in fear of bodily harm": Martin, Modern Law of Labor Unions, § 67.

Probably as fair a definition of "picketing" as may be found is that in Black's Law Dictionary:

"Picketing, by members of a trade union on strike, consists in posting members at all the approaches to the works struck against, for the purpose of observing and reporting the workmen going to or coming from the works, and of using such influence as may be in their power to prevent the workmen from accepting work there."

These definitions justify our statement that the ordinance is designed to prevent all three. We direct our attention particularly to the strike feature. Subsections a and b of Section 1 denounce any agreement between two or more persons

"not to buy from, sell to, or have dealings with, any person or persons in the city of Portland; or to induce, or attempt to induce, others not to buy from, sell to, or have dealings with, any person or persons in the city of Portland; for the purpose or with the intent

to prevent any person from employing any person, or for the purpose or with the intent to compel or force any person to employ or discharge from his employment anyone, or to compel or force any person to alter his mode of carrying on his business, or to limit or increase the number of his employees, or their rate of wages or their time of service."

An agreement not to have dealings with a person is involved in a combination of workingmen, acting in concert, to quit their employment, and such action constitutes a strike. That such is the interpretation placed upon the language of the act by the defendant city, is manifest upon reading the charging part of the complaint in the instant case which reads thus:

"The said defendant Earl Hall, on the 29 day of September, 1917, in the city aforesaid, did willfully and unlawfully enter into, assist and participate in a conspiracy to injure the business of Willamette Iron & Steel Works, a corporation doing business in Portland, Oregon, as follows, to wit: Said defendant did then and there enter into a combination or agreement with Alex B. Larson, W. L. Martin and Arthur Ulch to induce or attempt to induce others not to have any dealings with said corporation for the purpose and with the intent to compel said corporation to alter its mode of doing business, said defendant then and there agreeing and combining with said Alex B. Larson, W. L. Martin and Arthur Ulch to induce and attempt to induce, by picketing said corporation, the employees of said corporation who are not members of a labor union organization to quit work for and not to have dealings with said corporation and to join said defendant as members of a voluntary unincorporated labor union organization, and to continue to refuse to work for or to have dealings with said corporation until it shall agree to make such concessions concerning wages, hours, working conditions and grievances generally as will be acceptable to the workers and members of

said labor union organization, the present mode of carrying on business by such corporation being to refuse to receive or consider any such questions or controversies concerning wages, hours of labor, working conditions or other grievances with any person or persons as representatives of a labor union organization within the corporate limits of said City of Portland, Oregon, whereby the peace and quiet of said city was disturbed contrary to the ordinance in such case made and provided."

The question presented is: Can a municipality, in the exercise of its police power, enact legislation declaring the act of striking to be criminal. The problem before us is not at all a new one. Indeed, it is as old as the endless struggle between the employer and the employee. Legislatures as well as courts have sought to solve it, and with varying success. In 1875 the Parliament of England enacted an affirmative statute declaring that an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employer and workmen is not to be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime. The same legislation has been substantially adopted by twelve of our own states: California Penal Code, 581; Colorado, Revised Statutes, Section 3924; Maryland, Section 33, Art. XXVII, Pub. Gen. Laws; Minnesota, Section 4868, Revised Laws; Nevada, Section 6801, Revised Laws; New Jersey, Compiled Statutes, p. 3051; New York, Section 582, Consolidated Laws; N. Dak. Revised Codes of 1905, Section 8770; Oklahoma, Section 3764, Revised Laws; Pennsylvania Digest, 484 and 2017; Texas, Arts. 5244 and 5245, Revised Civ. Stats.; W. Virginia, Chap. 78, Acts of 1907. Twenty states, including Oregon, have statutes declaring it a

crime to use force, threats, or intimidation in connection with labor disputes. Our attention has not been called to nor have we found a case wherein a municipality other than the City of Portland had legislated upon the subject. The 63d Congress, in 1914, passed an act providing that no restraining order should hereafter be granted by any court of the United States which should prohibit any person or persons, singly or in concert, from quitting their employment or peaceably persuading others to do so.

The ordinance which we are now considering is the only one we have been able to discover which seeks to prevent workmen from quitting their employment in a body. Neither have we been able to discover a case in any state in the Union which holds that such concerted withdrawal from employment is either unlawful *per se* or that it may be enjoined. It will not be disputed that every workman has an absolute right, in the absence of contract, to quit his employment when he pleases and that the employer has the reciprocal right to discharge a workman in like manner. The fact that a number of workmen exercise this right in common cannot, we think, make the act criminal. Such a contention is opposed to the spirit of our laws and form of government. It is contrary to the public policy of the nation as expressed in its statutes and the decisions of the courts. It is true that there was a time when the courts of England held that an agreement of workmen to quit work in a body for the purpose of securing better wages or improved conditions for labor, was a criminal conspiracy at common law, but this attitude may well be considered to have been a survival of the spirit which existed when Gurth, the Saxon swine-herd, wore an iron collar riveted about his neck, and more than forty years ago the English

Parliament repudiated this doctrine by an affirmative statute. The act of quitting employment in a body cannot, in itself, involve any question of the public peace, health, or safety, unless it be complicated with some other problem as in time of war, and in such an emergency the problem is shifted to the state or federal government. In this particular, then, the ordinance is unreasonable and void as against public policy as disclosed in legislation, and the decisions of both state and federal courts.

However, we do not wish to be understood as holding that if the legislation had been in fact what it has been called—an anti-picketing ordinance—that it would have been necessarily invalid. The question of peaceable picketing is one that has been discussed frequently and for many years past, by the courts. The judicial opinions have been conflicting, and it is difficult to determine accurately where the weight of authority falls. All the authorities agree that picketing accompanied by threats, force and intimidation, is unlawful. Many courts have held that peaceable picketing is not illegal, while many others have held, and we think, with reason, that there can be no such thing as "peaceable" picketing. In *Pierce* v. *Stablemen's Union,* 156 Cal. 70 (103 Pac. 324), this view is expressed thus:

"A picket, in its very nature, tends to accomplish these very things. It tends and is designed by physical intimidation, to deter other men from seeking employment in the places vacated by the strikers. It tends and is designed to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect, disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and

women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition and to say that the picket may consist of nothing more than a single individual peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason."

The same view is expressed in *Barnes & Co.* v. *Chicago Typographical Union,* 232 Ill. 424 (83 N. E. 940, 13 Ann. Cas. 54, 14 L. R. A. (N. S.) 1018), as follows:

"There have been a few cases where it was held that picketing by a labor union of a place of business is not necessarily unlawful if the pickets are peaceful and well behaved; but, if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employer, it becomes unlawful. But manifestly that is not a safe rule, and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual motions or bias of the particular judge. To picket the complainant's premises was in itself an act of intimidation and an unwarrantable interference with their rights."

In a very recent case, *St. Germain* v. *Bakery & Confectionery Workers' Union* (Wash.), 166 Pac. 665, the Supreme Court of the State of Washington has adopted this view, and in an able and extended discussion has abundantly justified its position. A particularly clear summary of the approved doctrine in that case is voiced in the luminous concurring opinion of Mr. Justice CHADWICK, in which, after quoting exten-

sively from the case of *Jones* v. *Leslie,* 61 Wash. 107 (112 Pac. 81, Ann. Cas. 1912B, 1158, 48 L. R. A. (N. S.) 893), he says:

"That statement of the law is enough to close this controversy. Picketing is notice to the world that organized labor has blacklisted an employer. If it be wrong for the employer to take from the one who labors his capital, which is his right to offer his services in the market of labor, it is equally as wrong for the laborer, acting either individually or collectively, whether by peaceful or violent methods (for experience teaches us that either way invites breaches of the peace), to take from the employer the right to pursue his business unrestrained, so long as he does not violate the law of the land. The gist of the case does not lie in the manner in which either side proceeds to redress its wrongs, but the test is to be found in answer to the question whether under any set of circumstances a court of equity should affirm the *ex parte* judgment of a person or body of men acting extrajudicially, and put in his hand, or their hands, whether employer or employee, a roving commission to go out and redress a wrong, either real or fancied, in their own way."

4. It is true that all of these are chancery cases wherein an injunction was sought, but it is fundamentally true that whatever may be enjoined by a court of equity may by legislation be declared *malum prohibitum.*

The ordinance, however, not only denounces picketing, but includes voluntary abandonment of employment by workmen acting together, and the two are so woven together as to make the entire act void.

It follows that the petitioner must be discharged from custody and it is so ordered.

PETITIONER DISCHARGED.

Argued December 12, reversed December 27, 1917.

DERBY *v.* UNITED STATES FIDELITY & GUARANTY CO.*

(169 Pac. 500.)

States—Contracts—Right of Surety to Fulfill Contract.

1. It was the manifest right of the surety of a contractor to install plumbing in certain buildings for the state to fulfill the contract on its principal's default.

Evidence—Presumptions—Knowledge of Law—Knowledge of Bond Containing Statutory Condition.

2. The law imputes to a bank, which lent money to a contractor with the state to install plumbing in certain buildings, knowledge of the contractor's bond containing the statutory condition that the contractor should promptly make payments to all persons supplying labor or materials.

Evidence—Right of Surety to Perform Contract—Notice to Bank.

3. As a matter of law, a bank which lent money to a contractor with the state to install plumbing in its buildings was charged with notice of the right of the contractor's surety to take up and perform the contract on the contractor's default and to be subrogated to all the rights of the state as against him, including the application of the reserve percentages to cover the consequences of his failure.

Evidence—Presumption—Knowledge of Law and Consequences—Compliance With Statute.

4. By operation of law, notice was imparted to a bank, which lent money to a contractor with the state to install plumbing in its buildings, of what was required by the statute as to the contractor's giving bond, and of what it might have learned by inquiring of the state's officers, i. e., that a bond had been given, so that the surety making good the contractor's default would succeed to all its rights and be subrogated to the state's remedies to work out its reimbursement, all in preference to one holding a demand against the contractor for money lent to him.

Subrogation—Surety—Privity of Contract.

5. There was no privity of contract between a bank lending money to a contractor with the state to install plumbing in its buildings and the state, as there was between the contractor's surety and the state; the bank having no right, like the surety, to finish the work on the contractor's default with the resulting right of subrogation.

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*On right of sureties on contractor's bond, who perform contract on abandonment by contractor, to moneys unpaid on contract as against the assignee or creditors of contractor, see note in 14 **L. R. A. (N. S.)** 457.

On implied power to incorporate in contract for public work or in contractor's bond the requirement that the contractor shall pay laborers and materialmen, see notes in 11 **L. R. A. (N. S.)** 1028, and 46 **L. R. A. (N. S.)** 325.

REPORTER.

Subrogation—Right of Surety to Perform on Principal's Default—Effect—Exclusion of General Creditor.

6. On account of the elementary right of the surety of a contractor with the state to install plumbing in buildings to perform the contract on the contractor's default, when it did so it was entitled to all the benefits coming to the contractor under the contract, and to be subrogated to all the rights of the state respecting reserve percentages as a lever with which to enforce performance; all to the exclusion of a bank and general creditor.

[As to the right of subrogation, see note in 99 Am. St. Rep. 474.]

Bankruptcy—Rights of Trustee Against Bankrupt's Surety.

7. Likewise, the contractor's trustee in bankruptcy was postponed to the rights of the surety, since the trustee takes nothing his bankrupt does not take.

States—Surety for Contractor With State—Performance of Contract on Principal's Default—Right to Settle Accounts With State Auditor—Statute.

8. When a contractor with the state to install plumbing in buildings abandoned the work and his surety took his place and performed, the surety was entitled to settle its accounts and liability under the contracts and bonds with the state through its constitutional auditor, the Secretary of State, pursuant to Laws of 1913, page 607, prescribing such officer's duties with relation to the examination and determination of claims.

States—Surety on Contract With State—Application for Settlement After Performance—Right of Secretary of State.

9. When the surety of a contractor with the state to install plumbing in its buildings had finished the work on the contractor's default, and applied to the Secretary of State for settlement, he had a right to inquire, not only whether the surety had finished the work, but had complied with its bonds and paid persons supplying the contractor with labor and material for which they had not been paid.

Evidence—Presumption—Performance of Official Duty.

10. There is a presumption that an official duty has been regularly performed.

States—Decision of Auditor—Absence of Evidence to Controvert.

11. The decision of the state's auditing officer, the Secretary of State, as to the correctness of the claim of the surety for a contractor with the state which has performed on the contractor's default, is only *prima facie* correct, and may be disputed; but, where nothing appears to controvert the auditor's decision, it must control, it not being enough to cast doubts on the oral testimony by mere cross-examination.

Bankruptcy—Burden of Proof—Attack on Accounting by Trustee.

12. If the trustee in bankruptcy of a contractor with the state to install plumbing in buildings, and the bank which lent the contractor money, would overturn the accounting had by the surety for the contractor with the Secretary of State, supported by competent testimony, they must show the account is erroneous, and specify wherein it is at fault.

From Marion: WILLIAM GALLOWAY, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by F. N. Derby as trustee in bankruptcy for W. H. Rogers, doing business under the name of Rogers Plumbing & Heating Company, against the United States Fidelity & Guaranty Company, the United States National Bank and the Board of State Fair Directors. The directors do not appear to have been served or to have made any appearance in the case. For convenience the plaintiff will be designated as trustee, the United States Fidelity & Guaranty Company will be called the company and the United States National Bank will be known as the bank.

The substance of the complaint is that Rogers entered into contracts with the state for installation of plumbing in three certain buildings in connection with each of which he gave a bond to the state with the company as surety conditioned as follows:

"Now therefore, if the said principal, Rogers Plumbing & Heating Company, shall faithfully perform and execute said contract in full conformance with the terms thereof and to the satisfaction of the state architect, and shall faithfully perform all of the obligations of such contract, and shall promptly make payments to all persons supplying said principal with labor and materials for any portion of the work provided for in said contract, and shall hold the state harmless against any liens of whatsoever nature that may arise in course of the construction of the same, then this obligation to be void, otherwise to remain in full force and effect."

The first contract was dated December 4, 1913, for an armory building at Roseburg, Oregon, at the price of $4,140. The next was for the Exhibits Building at the Oregon State Fair Grounds at the contract price of $2,111, and the last was one dated June 3, 1914, for

the Feeble Minded Institution at the price of $737.60. The only thing in the complaint relating to the bank is the following allegation admitted by the bank:

"That shortly after the execution of the second contract herein referred to, to-wit: the said contract between the said W. H. Rogers and the State of Oregon, pertaining to the installation of the said plumbing in the Exhibits Building at the Oregon State Fair Ground, the said W. H. Rogers assigned to the defendant the United States National Bank, all sums of money due and owing from the State of Oregon to said W. H. Rogers under and by virtue of the said contract as the same should be fulfilled, and as said money should become due."

It is stated that Rogers entered upon the performance of the three contracts and after he had partly completed them he defaulted and

"thereafter the said United States Fidelity & Guaranty Company, defendant herein, as surety on said bond aforesaid, undertook the completion of said contracts and did thereafter complete the same."

The plaintiff also avers:

"That when the said contracts were so completed by the said United States Fidelity and Guaranty Company, said defendant collected from the State of Oregon the balance due from said state upon the contracts as aforesaid, including the amounts which had been earned by the said W. H. Rogers prior to the time of his default and for which he had not been paid, save and except the sum of $1,511.60, which said sum has been ordered paid to the said defendant United States Fidelity & Guaranty Company which is still held by the Board of State Fair Directors."

Stating in substance that he has no means of knowing the amount of labor or material furnished by Rogers prior to his default, and that the company used certain material belonging to the contractor which was

on hand, the exact amount of which was unknown to the trustee, he demands an accounting from the company. The bank admits the execution of the agreement for work at the Fair Grounds and of the surety bond accompanying it and the assignment to it by Rogers of the money that might become due to him under that contract. Otherwise it traverses the most of the complaint in material particulars. It states that when Rogers began performance of the contract for the building at the Fair Grounds he applied to it for money to enable him to purchase material and pay wages necessary for the execution of the work, and that he delivered to the bank the following writing:

"Ben W. Olcott, Secretary of State,
"Salem, Oregon.

"You are hereby authorized and instructed to retain and pay over to the United States National Bank of Salem, Oregon, any moneys that may be due or become due on any contract for furnishing of materials entering into a building now being constructed on the State Fair Grounds, under contract entered into by me with the State of Oregon.

"We authorize and empower said United States National Bank to act as our agent and in our name and stead to sign, receipt for and receive any warrant which may hereafter be drawn on the Treasury of the State of Oregon in payment of any of our warrants when paid by the State Treasurer.

"ROGERS PLUMBING & HEATING CO.,
"By W. H. ROGERS.

"The foregoing duplicate order (the original of which is on file in the office of Ben W. Olcott, Secretary of State) is given to secure any indebtedness incurred by us heretofore or that may be incurred in the future to the United States National Bank, of Salem, Oregon.

"Dated at Salem, Oregon, May 26, 1914.

"ROGERS PLUMBING & HEATING CO.,
"By W. H. ROGERS."

It counts upon this writing as an assignment of all money to become due to Rogers on the Fair Grounds contract and says that on the faith thereof it made sundry advances to him amounting to $1,500 which he used in the purchase of material and payment of labor in the performance of that job and for which he gave his notes to the bank no part of which has been paid except two amounts stated. The prayer of the bank is to the effect that the company take no right or interest in any of the money due on the contract and for its costs and disbursements.

After denying all the complaint except as stated in its answer, the company alleges in substance as to each contract that it gave the undertaking mentioned with the condition already quoted; that at the time of the execution of each contract and its bond, Rogers covenanted and agreed with the company to indemnify it and save it harmless against all loss, cost and damage that might accrue to it whether by reason of his act, default or neglect or on account of claims made in connection with the bond and agreed to repay the company all such loss; and that on the date of execution of the contract and undertaking, for the better protection of the company, Rogers assigned, transferred and conveyed to the company all his right, title and interest in and to all tools, plant, equipment and materials of every nature and description that he might then or thereafter have upon the work including also all materials purchased for or chargeable to the contract wherever situated; and further agreed that as of the date of the application for the bond the company should as his surety be subrogated to all his rights, privileges and profits as principal, and did as of that date assign, transfer and convey to the company all the deferred payments and retained percent-

ages and any and all moneys and profits that might become due and payable to him at the time of his breach or default or that might thereafter become due and payable to him on account of such contract or on account of extra work or materials supplied in connection therewith, and that all such moneys should be the sole property of the company to be by it credited upon any cost, charge or expense sustained or incurred by it under its bond of suretyship. The company's answer states as to every contract that it entered upon the work for the purpose of finishing it after the default of Rogers, discharged his unpaid liabilities for labor and materials, and completed the undertaking at a loss to itself in an amount stated for each building. The company also traverses the answer of the bank. The Circuit Court heard the case and decreed in substance that the company pay to the trustee $825.05, and to the bank $1,034.37, together with the costs and disbursements of each. The company appeals. REVERSED. SUIT DISMISSED.

For appellant, United States Fidelity & Guaranty Company, there was a brief over the names of *Mr. John Bayne* and *Messrs. Beach, Simon & Nelson,* with an oral argument by *Mr. Bayne.*

For respondent, F. N. Derby, there was a brief over the names of *Mr. Walter C. Winslow* and *Mr. Robin D. Day,* with an oral argument by *Mr. Winslow.*

For respondent, United States National Bank (of Salem, Oregon), there was a brief over the name of *Messrs. Carson & Brown,* with an oral argument by *Mr. John H. Carson.*

No appearance for respondents, the Board of State Fair Directors.

MR. JUSTICE BURNETT delivered the opinion of the court.

1–4. It is stated by the complaint and although formally denied on information and belief by the bank, it is not contested that the company entered upon and completed the three contracts after the default of Rogers. It first will be necessary to settle the matter of priority between the company and the bank. The former was the surety of Rogers, undertaking in each instance not only that he would perform all the obligations of the contract but also that he should promptly make payments to all persons supplying him with labor or materials for any portion of the work required. The bank did not occupy the position of surety. It loaned money to Rogers and became only his general creditor. There is no proof that the cash which the bank advanced went into the Fair Grounds building and even if there were, its payment is not covered by the statutory bond. It is provided in substance by Chapter 27, Laws of 1913, p. 59, that the contractor in instances like those described in these proceedings

"shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts."

The agreement between the state and Rogers stipulated in each instance for the retention of 20 per cent of the contract price until the entire completion of the work, the other 80 per cent to be paid proportionately at different stages of its progress. It was the manifest right of the surety to fulfill the contract on the

default of its principal. Whatever right it had to the fund reserved under the contract is coeval with the execution of the bond and the signing of the building agreement, both instruments being part of the same transaction. The bank knew that the contract was with the state. The law imputes to it a knowledge of the bond containing the statutory condition. As a matter of law it was charged with notice of the right of the surety to take up and perform the contract in place of Rogers on his default and be subrogated to all the rights of the state as against him including the application of the reserved percentages to cover the consequences of his failure. This position is fortified by the plea of the company proved by the documents signed by Rogers as part of the transaction whereby he transferred to it as his surety all money of every sort payable to him under the contract. That assignment was only declaratory of the right the law gave to the surety. This is further strengthened by the allegation which the bank admits to the effect that the assignment to it of the money took place shortly after the execution of the Fair Grounds contract; while the proof shows that the assignment to the company was made as part of the execution of the contract. It is not a question as between two different assignees of the same chose in action each ignorant of the other's claim to it where it might be contended that the one first giving notice to the person owing the debt that it had been transferred would be entitled to collect it. By operation of law notice was imparted to the bank of what is required by the statute and what it might have learned in fact by inquiry of the officers of the state, namely, that a bond had been given with the consequence arising from the situation that the surety making good the default

would succeed to all the rights of the contractor and be subrogated to the remedies of the state to work out its reimbursement, all in preference to one holding a demand against the contractor for money loaned to him. Within the terms of this admitted allegation of the writing set forth in the answer of the bank it was evidently contemplated by it and Rogers that the bank should receive the money due to him and not to his surety as the contract was fulfilled by him and not by the company.

5. There was no privity of contract between the bank and the state as there was between the surety and the state. The bank had no right like the company to step in and finish the work with the resulting right of subrogation. A leading case under a statute like ours is *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U. S. 404 (52 L. Ed. 547, 28 Sup. Ct. Rep. 389). As in the present instance a bank had loaned money to a contractor and he assigned to it the money coming to him under his agreement; but he afterwards defaulted and his surety was compelled to finish his job. Mr. Justice BREWER discusses all the features of the case and concludes the matter by approval of the following language of the Circuit Court of Appeals:

"Whatever equity, if any, the bank had to the fund in question arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled to assert the equitable doctrine of subrogation. But it is equally clear that the bank was not for it was a mere volunteer and under no legal obligation to loan its money."

6, 7. The following authorities are to the same effect: *Title, Guaranty & Surety Co.* v. *Dutcher*, 203 Fed. 167; *Illinois Surety Co.* v. *City of Galion*, 211 Fed. 161; *In re Scofield Co.*, 215 Fed. 45 (131 C. C. A. 353); *In re*

P. McGarry & Son, 240 Fed. 400. In *Wehrung* v. *Denham,* 42 Or. 386, 392 (71 Pac. 133), this court held that retained payments constitute a fund for the protection of the surety. It is plain, therefore, that on account of the elementary right of the surety to enter upon and perform the contract in which its principal has made default it is entitled to all the benefits coming to him under the contract and to be subrogated to all the rights of the state respecting the reserved percentages as a lever with which to enforce performance, all to the exclusion of the bank which occupies only the position of general creditor. This same principle also postpones the trustee who takes nothing his bankrupt could not take.

8. We pass, therefore, to the question of whether the company has shown a right to retain the moneys in question. That it finished the works is not disputed. That it was liable to liquidate the unpaid claims against Rogers for material and labor is nominated in the bond it gave. When he abandoned the work the company took his place and having finished the undertakings it was entitled to settle its accounts and its liability under the contracts and bonds with the State of Oregon through its constitutional auditor, the Secretary of State. Under the provisions of Chapter 314, Laws 1913, that officer is required

"to examine and determine the claim of all persons, firms or corporations against the state, in cases where provisions for the payment thereof shall have been made by law, * * and to draw a warrant upon the treasury for the same"; *provided,* "that no claim be allowed and no warrant drawn until services have actually been rendered, or goods, wares, merchandise or other articles have actually been delivered to and received by the state or its duly authorized agent."

9–12. The very essence of the complaint and of the answer of the bank is that the company has collected money from the state on these contracts and that is conceded. When the company had finished the work and applied to the Secretary of State for settlement he had a right to inquire not only whether the surety had finished the work but also whether it had complied with the terms of its bond and had caused payment to be made to persons supplying its principal with labor and material for which they had not received compensation. It is presumed that official duty has been regularly performed. In the absence of any other showing, therefore, we must assume that the auditing officer of the state inquired and found that the labor and materials had been furnished and used in the construction of these several state buildings and that the surety perforce had paid for them. Under the pleadings, therefore, a *prima facie* case appears in favor of the company to the effect that it is rightly in possession of the money which it received in the settlement of its accounts with the state for lawfully it could not have obtained it otherwise. In addition to this the testimony of workmen actually engaged on the jobs shows that materials described in the bills rendered to the company by various tradesmen and laborers were actually employed in the construction of the buildings. The only attack upon this oral testimony is by way of cross-examination and the utmost shown thereby is that some of the witnesses who claim to have shipped materials to the contractor for the firms they represent could not say of their own knowledge that they actually saw the shipments delivered on the ground or that the identical material went into the construction of the buildings. This is only negative in value and does not impeach in any way the

prima facie case made on the pleadings that the Secretary of State ascertained in his official capacity that the materials and labor had been furnished and paid for by the company. It is true as pointed out in effect in such cases as *State* v. *Brown,* 10 Or. 215, *Shattuck* v. *Kincaid,* 31 Or. 379 (49 Pac. 758), and *Gibson* v. *Kay,* 68 Or. 589 (137 Pac. 864), and other like cases, that the decision of an auditing officer is only *prima facie* correct and that it may be disputed; but where, as in this instance, nothing appears to controvert the decision of the auditor it must control the decision of the issue presented. It is not enough to cast doubts upon the oral testimony by mere cross-examination. If the plaintiff and the bank would overturn the accounting had with the Secretary of State, supported as it is by competent testimony given at the hearing of this case, they must show that the account is erroneous and specify wherein it is at fault.

The conclusion of the whole matter is that by virtue of its relation of suretyship to the original contractor the company is entitled to precedence over the bank which occupies the position of a general creditor and the trustee in bankruptcy who takes only what Rogers would have taken had the different enterprises been carried forward to completion under his management; and further, that there is nothing here to dispute the *prima facie* correctness of the audit of the state's officer when it settled with the company.

The decree of the Circuit Court is reversed and the suit is dismissed with costs and disbursements in favor of the company and against the plaintiff and the bank. REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

MR. JUSTICE HARRIS concurs in the result.

Argued December 11, modified December 27, 1917.

ELLIOTT *v.* CITY OF PORTLAND.*

(169 Pac. 504.)

Municipal Corporations — Collection of Special Assessments — Sale of Land.

1. Under the Portland Charter, the city may collect a reassessment for a public improvement by a city treasurer's sale instead of enforcing the judgment confirming the reassessment by execution.

Municipal Corporations — Assessment for Public Improvements — Interest.

2. Portland Charter, Section 400, authorizing reassessments for public improvements, provides that interest thereon, from the date of delinquency of the original assessment, may be added at the discretion of the council. Section 407 provides that the docket of city liens is a public writing, and that from the date of the entries therein of an assessment, the sum as entered is a tax levied and a lien upon the property, and that the sum entered shall be due and payable from the date of such entry, and if not paid within ten days shall be deemed delinquent and bear interest at the legal rate. Section 401 provides that any person who has filed objections to a reassessment, which have not been satisfied by the council, may appeal to the Circuit Court. *Held*, that interest on a reassessment from the date of the delinquency of the original assessment cannot be collected, where the reassessment ordinance contains no provision for interest, and where an appeal is taken from the reassessment to the Circuit Court and then to the Supreme Court, the assessment does not bear interest until ten days after the judgment of the Circuit Court, confirming it, becomes final by the filing of the mandate from the Supreme Court.

Municipal Corporations—Assessment for Public Improvements—Review.

3. An appeal to the Circuit Court, under Portland Charter, Section 401, from a reassessment for a public improvement, transfers the assessment proceeding, as to those parties who appeal, to the Circuit Court.

Municipal Corporations—Assessment for Public Improvements—Sale—Costs and Expenses.

4. Where appeals were taken, under Portland Charter, Section 401, from a reassessment for a public improvement, the assessments against the property of those who appealed were not delinquent, while the appeals were pending, and no valid sale of the property could be made, though the property owners did not take measures to stay proceedings under the reassessment ordinance, and the cost of advertising the property on attempted sales could not be collected from the property owners under Section 412, providing that each piece of land shall be sold for a sum equal, but not exceeding the unpaid assessment, and the interest and cost of advertising and sale.

*On the question of implied right to interest on taxes or assessment for public improvement, see note in 6 L. R. A. (N. S.) 694.

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Municipal Corporations—Assessment for Public Improvements—Cancellation of Illegal Items.

5. Where a city was about to sell property for the purpose of collecting a reassessment for a public improvement, and was claiming the right to collect interest and expenses, which it was not entitled to collect, the property owners had no remedy at law affording them adequate relief, and equity would lend its aid to cancel the illegal items on the docket of liens.

From Multnomah: ROBERT G. MORROW, Judge.

This is a suit by W. C. Elliott, Geo. A. Young and Nellie E. Young, F. J. Shuldt, W. D. Helene, U. G. Love, J. R. Criger, E. V. Deickworth, E. C. Brown and S. A. Brown, G. H. Austin and L. G. Austin, D. D. Ogle and Tillie V. Ogle, C. I. Snyder, S. E. Snyder, Otto and Anna Svoboda, Ida Bush, Charles Lomerine, J. G. Mann, John Simon, Fred West, L. L. Mallett, C. A. Ames and E. F. Ames, H. R. Blue, Grace L. Finley, L. G. Brazen, Alfred Carlberg, Magnus Carlquist, J. C. and L. J. Winfield, C. L. Olsen, C. J. Engberg, Mary A. Smith, W. C. Lindsey, Julia L. Ruble, Sarah A. Nolta, Bessie Smith, H. A. Ruble, John P. McDonough, S. W. and W. M. Sawyer, H. F. Liebermann, R. S. Leigh, Ira D. Baker, Oscar Briethaupt, Luke Stoneman, A. F. Swenson, A. E. Oberg, John Tierney, Roscoe and Marie Yokum, Walter Hughes, Florence Olson, Carrie Olson, Elizabeth Cox, M. L. McMahon, E. M. Orth, E. L. Casey, E. D. Casey, T. C. Shaw, B. G. Selberg, A. A. and S. D. Young, A. H. Pinnish, and James Paulson, against the City of Portland, a municipal corporation.

From a decree in favor of plaintiffs, the defendant city appealed. Modified.

Department 1. Statement by MR. JUSTICE BEAN.

This is a suit to enjoin a sale of certain property by the city treasurer for the purpose of collecting a reassessment against the same for the Riverside sewer

and to cancel certain amounts of interest and costs of advertising the lots upon former attempted sales. A decree was rendered by the trial court in favor of the plaintiffs and the defendant appeals. MODIFIED.

For appellant there was a brief over the names of *Mr. Walter P. La Roche*, City Attorney, and *Mr. Lyman E. Latourette*, Deputy City Attorney, with an oral argument by *Mr. Latourette*.

For respondents there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. C. L. Whealdon*, with an oral argument by *Mr. Duniway*.

MR. JUSTICE BEAN delivered the opinion of the court.

1–3. On June 23, 1910, the common council of the defendant City of Portland commenced proceedings for the construction of a system of sewers in that city known as the "Riverside District Sewer," and on or about July 1, 1911, preliminary assessment Ordinance No. 2306 was passed by the council attempting to make a proposed assessment on the property of the plaintiffs located in such sewer district. Objections were filed to such preliminary assessment and thereupon the proceedings were vacated and a reassessment allowed. On November 8, 1911, a reassessment Ordinance No. 24,280 was adopted by the common council. Plaintiffs took an appeal from the reassessment to the Circuit Court pursuant to Section 401 of the city charter. A verdict and judgment was obtained in favor of the municipality declaring the reassessment as prescribed in Ordinance No. 24,280. On appeal to this court the judgment was affirmed: See *City of Portland* v. *Blue*, 77 Or. 131 (149 Pac. 548). The mandate was entered in the Circuit Court August 6, 1915.

The plaintiffs complain that instead of enforcing the judgment in the former case upon execution the city has proceeded to sell the property at a city treasurer's sale. Since this appeal was taken this question has been determined by this court in the case of *West* v. *Scott-McClure Land Co.*, 84 Or. 296 (164 Pac. 554), wherein it was clearly pointed out by Mr. Justice BURNETT that all the proceedings for such a reassessment are purely charter proceedings and that such a sale is properly made by the city treasurer according to the provisions of the charter. The city has a right to collect the reassessment by a treasurer's sale. This leaves for consideration the matter of interest and costs. The city maintains that it has authority to collect interest on the amount of the reassessment from the date of the delinquency of the original assessment. Plaintiffs contend that Ordinance No. 24,280 and the verdict and judgment affirming the same do not provide for such interest. Section 400 of the charter authorizing the council by ordinance to make a reassessment provides:

"Interest thereon from the date of delinquency of the original assessment may be added at the discretion of the council."

An examination of Ordinance No. 24,280 discloses that no interest on the several amounts assessed against the several lots was thereby ordained. It made no provision for such interest thereby indicating that in its judgment none should be charged. This assessment as declared by the ordinance was affirmed by the verdict of the jury and the judgment on the appeal; hence the computation of interest is governed by the general provision. Section 407 of the charter is as follows:

"The Docket of City Liens is a public writing, and from the date of the entry therein of an assessment the sum as entered is hereby declared to be a tax levied and a lien upon such lot, part thereof, or tract of land, which liens shall have priority over all other liens and encumbrances whatsoever thereon, and the sum or sums of money assessed for any local improvement, entered upon such lien docket, shall be due and payable from the date of such entry, and if not paid, or bonded as provided by law, within ten days from the date of such entry, thereafter the same shall be deemed to be delinquent and shall bear interest at the legal rate."

This section considered with Section 400 provides that a valid assessment shall be deemed delinquent and bear interest ten days after the entry thereof in the lien docket. Section 401 of the charter provides in part that

"any person who has filed objections to such new assessment, or reassessment, which have not been satisfied by the amendments made by the council may appeal to the circuit court of the State of Oregon for the county of Multnomah from the assessment against any property owned by him or in which he has an interest."

The appeal transfers the assessment proceedings as to those parties who appeal to the Circuit Court: Page & Jones on Taxation by Assessment, § 1360. An assessment could not be delinquent before it is made or duly declared by ordinance and is complete; hence the most that can be claimed from this charter is that in order to give an invalid assessment sufficient force to have added to it interest from the date the original assessment would, if valid, become delinquent, the council must so declare by ordinance pursuant to the authority of that part of Section 400 above quoted. Such special assessments do not bear interest unless

by a particular provision of law: *Mall* v. *City of Portland,* 35 Or. 89 (56 Pac. 654). It is plainly announced in the opinion in the case of *West* v. *Scott-McClure Land Co.,* 84 Or. 296 (164 Pac. 554), that the proceedings upon an appeal to the Circuit Court from a reassessment are a part of the workings of the machinery of the city and the result is merely a revision of the amounts already levied upon the property by the city ordinance. The ordinance does not become final and the assessment is not complete until the judgment of the Circuit Court finally affirms the same either as revised or *in toto* as the case may be. In the case of *City of Portland* v. *Blue,* 77 Or. 131 (149 Pac. 548), involving the reassessment in question, the judgment of the Circuit Court approving the same became final when the mandate was entered August 6, 1915. Interest could not be added to the various amounts assessed against the property of plaintiffs who took that appeal until ten days thereafter: *Giles* v. *Roseburg,* 82 Or. 67, 70 (160 Pac. 543).

4, 5. It is asserted that the city is entitled to collect the cost of advertising the property for sale. That part of Section 412 of the charter expressly providing for collecting the cost of advertising reads as follows:

"Each piece or tract of land shall be sold, separately, and for a sum equal to but not exceeding the unpaid assessment thereon and the interest and cost of advertising and sale; and when there shall be more than one bid the land shall be sold to the bidder offering to take the same for the least amount of penalty and interest."

The point presented by plaintiff's counsel is that the cost of advertising with reference to attempted sales which were illegal cannot be included. The city's counsel agree to this proposition, but do not

agree that any of the sales referred to in the complaint were illegally attempted. We, therefore, have to consider the question of whether such attempted sales were legal. After certain property owners took the appeal to the Circuit Court from the assessment against their property made by Ordinance 24,280 and while the appeal was pending the auditor issued a delinquency statement to the treasurer who advertised the property and exposed the same for sale. Part of the property was sold, but other portions including most of that described in the complaint was not sold for want of bidders. Some time afterward the auditor issued another delinquency statement to the treasurer who again advertised and exposed for sale the property upon which the assessment had not been collected. The result was similar to the preceding offer. Another like attempt was afterwards made with a similar result. The expense of advertising with reference to these three attempted sales is here in question. What we have already said in regard to the time when the assessment became final in considering the matter of interest is also applicable to the question of costs. The property of those who did not appeal from the reassessment was not affected by the appeal. As to those taking the appeal the time was not ripe for making a sale of their lots to pay for an assessment which was then being adjusted in accordance with the provisions of the charter. That law gave to them the right to take such proceedings and thereby obtain the benefit of having a jury pass upon the amount that should be a lien upon their lots. The only penalty that they should pay is the amount of the costs of the trial in the Circuit Court. When the sales were attempted the amounts to be charged against their property had not been definitely and finally deter-

mined. This must be done before a sale: 10 R. C. L., p. 1291, § 86. The assessment was not then delinquent or due and no valid sale could then be made. The owners should not be burdened with the costs of such invalid attempted sales. It would have been an easy matter for the city officials to have noted the appeal on the lien docket and excluded the lots affected from the delinquency certificate and the advertisement. It was not a matter of the property owners' taking measures to stay the proceeding under Ordinance No. 24,280. Steps were then being taken to make the levy pursuant to the charter in the proper forum, namely, the Circuit Court. The controversy arose by virtue of attempting to collect the assessment before it was levied. Where a sale of property is made under a special power the execution of the power must show upon its face that the statute has been strictly complied with: 10 R. C. L., p. 1289, § 84. The plaintiffs recognize the legality of the demand of the city as established by the judgment on the appeal. The amount of costs and interest are separate and distinct therefrom. Under the general rule equity should lend its aid to correct the erroneous additions of such sums to the amount of the liens: 1 Pom. Eq. Juris., § 26 et seq. Plaintiffs have no remedy at law which would afford them adequate relief in the cancellation of the numerous illegal items.

This suit was dismissed by the trial court as to the following named plaintiffs who did not appeal from the reassessment Ordinance No. 24,280, to wit: Nellie E. Young, W. D. Helene, E. V. Deickworth, G. H. Austin, L. G. Austin, L. L. Mallett, E. F. Ames, Alfred Carlberg, L. J. Winfield, Sarah A. Nolta, Bessie Smith, Ida Bush, A. E. Oberg, Walter Hughes, E. M. Orth, E. L. Casey, James Paulson. The decree of this court will therefore not affect their interests.

The assessment of those of the plaintiffs who did not appeal from Ordinance No. 24,280, namely, E. C. Brown, Grace Finley, U. G. Love, T. V. Ogle and Anna Svoboda, can be affected only as to interest which should be computed from ten days after the reassessment was docketed.

The decree of the lower court is in part as follows:

"And it is further ordered, adjudged and decreed that all entries in the docket of said liens against plaintiffs' property, of costs and expenses of holding said treasurer's sales of plaintiffs' said property since the appeal of the plaintiffs from said reassessment Ordinance No. 24,280 on November 17, 1911, * * be and the same are hereby canceled and held for naught. * * "

That part of the decree as to costs and expenses of the three attempted sales is affirmed and the decree of the lower court will be modified so as to allow the city, if necessary, to proceed with the sale of the lots for the payment of the assessment as affirmed by the verdict and judgment in the Circuit Court with interest on the various amounts at the legal rate from August 16, 1915. Under the circumstances of this case each party should pay his or its own costs in this court. MODIFIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued December 18, 1917, affirmed January 8, 1918.

PURDY *v.* UNDERWOOD.*

(169 Pac. 536.)

Fraud—Statement of Material Facts—Good Faith.

1. Where a vendor of land by the acre states there are a certain number of acres in the tract, it renders him responsible for damages if there are less than stated, although he believed it to contain such amount.

Fraud—Sales of Land—Measure of Damages.

2. Where a purchaser buys what the vendor states to be 112.5 acres of land at $50 per acre and there are only 78.76 acres, the vendee is entitled to recover the excess paid in an action for fraud, even though he sold the same for as much as he paid without knowledge of the shortage; although the measure of damages is different where property is exchanged, the measure of damages in such case being the difference between the value of the property given and that received.

Mortgages—Deed Given as Security—Evidence.

3. Evidence *held* sufficient to warrant a finding that a deed absolute in form was intended only as security for a loan.

Mortgages—Deed Given to Secure Loan—Title.

4. A deed absolute in form given to secure a loan does not pass the title and is nothing more than a "mortgage."

[As to liability of vendor of realty for false representations innocently made, see note in Ann. Cas. 1913C, 63.]

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is an action to recover damages for alleged fraudulent representations. The facts involved are that on June 29, 1910, the defendant was the owner in Marion County, Oregon, of a tract of land the boundaries of a part of which he pointed out to the plaintiff telling him the real property contained 112.5 acres. The price demanded by the defendant was $55 an acre, but he offered to take in cash $50 and thereupon a bar-

*On measure of damages for fraudulent representations in the sale or exchange of real estate, see notes in 8 L. R. A. (N. S.) 804; 16 L. R. A. (N. S.) 818.

On parol evidence that a written instrument which on its face imports a complete transfer of a legal or equitable estate or interest in property was intended to operate as a mortgage or pledge, see comprehensive note in L. R. A. 1915B, 18. REPORTER.

gain was concluded whereby the plaintiff paid $5,625 and received a warranty deed describing the premises by metes and bounds "and containing in all 112½ acres of land, more or less." The plaintiff in October, 1911, for the expressed consideration of one dollar, executed to his wife, Ella Purdy, a warranty deed conveying the land by the same description and asserting that the premises contained the same area as set forth in the deed which he received from the defendant. About December 1, 1915, the plaintiff procured a survey of the real property, much of which was covered with brush, and the boundaries being very irregular, he then discovered that the premises contained only 78.76 acres.

This action was commenced January 29, 1916, the complaint charging that the defendant intending to cheat and defraud the plaintiff, falsely and fraudulently represented to him that the land contained the number of acres as stated; that the plaintiff not knowing the area of the premises, but believing and relying upon the statements so made by the defendant, paid him at the rate of $50 an acre, and thereafter discovered that the realty contained only 78.76 acres; that such representations were known by the defendant to be false when they were uttered, particularly stating wherein they were untrue, and that by reason thereof the plaintiff had been damaged, etc.

The answer denied the material averments of the complaint, and for a further defense alleged that on October 2, 1911, for the full and valuable consideration demanded by the plaintiff, he sold and conveyed the entire real property to Ella Purdy, who ever since has been and then was the owner thereof, and that the plaintiff had no right, title, claim or interest of any kind whatever in or to the land or any part thereof. A demurrer to the allegations of new matter in the an-

swer on the ground that the facts stated were insufficient to constitute a defense, was sustained. By stipulation of the parties the cause was tried without the intervention of a jury, whereupon the court from the evidence received made findings of fact and of law in conformity with the averments of the complaint, and thereupon rendered judgment for $1,687 against the defendant and he appeals. AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. C. Schuebel* and *Mr. Livy Stipp.*

For respondent there was a brief over the name of *Messrs. Brownell & Sievers,* with an oral argument by *Mr. Charles T. Sievers, Jr.*

MR. JUSTICE MOORE delivered the opinion of the court.

This action is not founded upon an alleged breach of warranty as to the number of acres specified in the deed, which instrument it will be remembered limits the premises particularly described by metes and bounds, by the clause "and containing in all 112½ acres of land, more or less." A text-writer in speaking of such a restriction says:

"When land is described, and the quantity is stated with the qualification 'more or less' these words are used as an approximate designation of the quantity contained within the boundaries, and do not refer to the state of the title": Devlin on Deeds, § 1046.

This author further remarks:

"Neither party has a remedy against the other for the excess or deficiency unless the difference is so great as to afford a presumption of fraud": Devlin on Deeds, § 1044.

In a note to the case of *Kitzman* v. *Carl,* 12 Ann. Cas. 296, 297 (133 Iowa, 340, 110 N. W. 587), it is observed:

"The general rule is, that where land is sold by metes and bounds or by a definite description, and is

estimated to contain a specific quantity, qualified by the words 'more or less,' the recital of the words 'more or less' implies a waiver of the warranty as to the specific quantity on the part of the buyer, and an agreement on the part of the seller not to demand more than the fixed price. By the use of these words the statement of the number of acres becomes descriptive merely, and not of the essence of the contract. The vendor assumes the risk as to the price paid, and the vendee assumes the risk as to the quantity of the land."

At page 299 of the volume mentioned it is further said:

"Where the difference between the real and the represented quantity of land sold, especially in the sale of land by the acre, is so great as to indicate mistake, the words 'more or less' will not cover it, inasmuch as they are construed to apply to a reasonable excess or deficit, and in such cases a court of equity will grant relief."

Whether or not these rules are controlling herein is unimportant for the question is not involved, since the complaint does not refer to any covenant contained in the deed, and the action is predicated upon the alleged fraud and deceit of the defendant in representing that the land conveyed contained a specified number of acres, when the area of the premises was only 70 per cent thereof.

1. The evidence shows that when the defendant purchased the real property in question his grantor stated to him the premises contained 112.5 acres; that the land had not been surveyed nor did Mr. Underwood know the actual contents thereof, except as thus informed; and that he told the plaintiff, when he pointed out to him a part of the boundaries, that the realty included the number of acres so specified. This representation was material and though false it was not consciously so, but that is immaterial for the statement

having been made without knowledge of its truth and believed and relied upon by the plaintiff renders the defendant responsible for the resulting damages: Kerr on Fraud, 54; Smith, Law of Fraud, § 45; *Cawston* v. *Sturgis,* 29 Or. 331 (43 Pac. 656); *Poppleton* v. *Bryan,* 36 Or. 69 (58 Pac. 767); *Darling* v. *Miles,* 57 Or. 593 (111 Pac. 702, 112 Pac. 1084); *Bonelli* v. *Burton,* 61 Or. 429 (123 Pac. 37); *Joplin* v. *Nunnelly,* 67 Or. 566 (134 Pac. 1177); *McFarland* v. *Carlsbad Hot Springs Sanatorium Co.,* 68 Or. 530 (137 Pac. 209, Ann. Cas. 1915C, 555); *Neilson* v. *Masters,* 72 Or. 463 (143 Pac. 1132); *Robertson* v. *Frey,* 72 Or. 599 (144 Pac. 128); *Jeffreys* v. *Weekly,* 81 Or. 140 (158 Pac. 522).

2. It is argued by defendant's counsel that the plaintiff is not entitled to recover herein, because he sold and conveyed to his wife the real property by the same descriptions and covenants as set forth in the deed that he secured, which transfer of the title was made while he was ignorant of a shortage in the stated area of the land, and as he is not responsible to her for any deficiency in the number of acres he did not sustain any damages and for that reason an error was committed in refusing to make a finding as requested and in rendering the judgment given him. In 20 Cyc. 136, it is said:

"The rule established by the weight of authority appears to be that if a purchaser, through fraud practiced upon him, has paid a higher price than the property was worth, and the fraud is actionable in its character, then he is entitled to recover for the injury occasioned by such fraud, notwithstanding any subsequent disposition he may make of the property, and hence a recovery cannot be defeated, or the amount of damages reduced, by showing that plaintiff has sold the property for the same amount that he paid for it, or for a larger amount than he claims its real value to have been."

See, also, upon this subject, Smith, Law of Fraud, §§ 250 and 298. In *Medbury* v. *Watson,* 6 Met. (47 Mass.) 246, 256 (39 Am. Dec. 726), in discussing this subject, Mr. Justice HUBBARD states the contention made by a party and gives the reason for refuting it. He says:

"But it is further argued that the father, having sold out his share of the property for the same amount which he gave, has sustained no loss, and so there can be no recovery by the present plaintiffs. But this suggestion, though plausible, is not sound. What the party sold the property for, is not the rule by which to measure the damages; otherwise, it might make the question of fraud to depend upon the rise or fall of the property in the market, upon fluctuations in the value, arising from causes in no way connected with the fraud complained of. As well might an underwriter contend that the insured has sustained no injury, because his goods, though partially damaged by a peril insured against, have sold, even in their damaged state, for more than the actual cost. If the father, through fraud practiced upon him, paid a higher price than the estate was worth, and the fraud was actionable in its character, then he is entitled to recover for the injury occasioned by such fraud, whatever disposition he afterwards made of the property; whether he sold it or gave it away."

In *Teachout* v. *Van Hoesen,* 76 Iowa, 113 (40 N. W. 96, 14 Am. St. Rep. 206, 1 L. R. A. 664), it was ruled that the fact that a person had sold all his stock in a corporation did not prevent him from maintaining an action for fraudulent representations whereby he was induced to become a stockholder therein.

In *McKay* v. *McCarthy,* 146 Iowa, 546 (123 N. W. 755, 34 L. R. A. (N. S.) 911), it was held that the fact that one defrauded into purchasing stock of a corporation had parted with it did not affect his right to hold the

person guilty of the fraud liable for the damages caused thereby.

It is contended by defendant's counsel that the rule thus recognized is not available in Oregon where the measure of damages in such cases is the difference between the actual value of the property at the time of the purchase and the price paid therefor, and that as the plaintiff, for a valuable consideration, sold and conveyed the real property as containing 112.5 acres, before he knew of the deficiency in the area of the premises, he sustained no damages, citing in support of the principle so asserted, 20 Cyc. 42 and 43. They also call attention to decisions of this court which will be reviewed. Thus in *McMillan* v. *Batten,* 52 Or. 218 (96 Pac. 675), the defendant sought to rescind a sale of shares of corporate stock on the ground of fraud and deceit. No damages were demanded but a recovery of the purchase price in assumpsit as money had and received was asked.

In *Sperry* v. *Stennick,* 64 Or. 96 (129 Pac. 130), the plaintiffs were the holders of many shares of the capital stock of a corporation, which legal entity was induced, by the defendant's fraudulent representations, to pay $7,000 on account of the purchase of a supposed interest in land, taking a deed therefor. The plaintiffs thereupon surrendered all their interest in the corporation, obtained from it, for a valuable consideration, a deed of the supposed estate in the land and thereafter learning of the fraud, they elected to rescind, tendered a reconveyance and demanded a repayment of the $7,000 as money had and received. No damages were demanded in that case.

In *Salisbury* v. *Goddard,* 79 Or. 593, 600 (156 Pac. 261), which was an action, without rescission, to recover damages for alleged false representations

whereby an exchange of property was consummated. In deciding that case it was said:

"If, therefore, the plaintiffs received property of equal value of the lot which they conveyed, and the money they paid, they were not injured and sustained no damages."

In that case the worth of the property received could be established only by testimony, while evidence of the mere amount of money paid was sufficient to substantiate that fact since such medium of exchange is the measure and representative of all values. The legal principle invoked by defendant's counsel is applicable where property is exchanged. The conclusion thus reached does not contravene the rule announced in *Alden* v. *Wright,* 47 Minn. 225 (49 N. W. 767), which is cited in 20 Cyc. 43, as upholding the doctrine for which defendant's counsel contend. In that case, which was an action of deceit, real property was exchanged for shares of corporate stock, and it was held that the measure of damages was the difference between the value of such shares and the property received therefor. When, however, as in the case at bar, a specified sum of money is paid for each integral part of property expected to be received, a failure to transfer a portion thereof at such ratable price, constitutes the measure of damages sustained. Thus as was said by the court in *Rockefeller* v. *Merritt,* 76 Fed. 909 (35 L. R. A. 633, 638, 22 C. C. A. 608):

"If a vendor represents to a purchaser that a tract of land contains 10 acres more than it actually measures, and thereby induces him to buy and pay for it at the rate of $30 per acre, he is estopped from showing that the land was of less value, because the purchaser has actually paid and lost $30 per acre upon the 10 acres that did not exist."

3. The evidence fails to show the amount of the consideration which was paid by Mrs. Purdy for the land described in the deed executed to her by her husband. Mr. Purdy, explaining how he came to give such deed, testified:

"Well, she had let me have money at different times and I just made her a deed out to the place for the money I had borrowed from her.

"Q. Well, was there any understanding between you?

"A. Yes, there was an understanding.

"Q. Well, what was it?

"A. Well, I just agreed—I was willing to make her a deed to the place on account of getting this money from her. That's all I guess. It was her own—I say she had money and I wanted to use it, and I just borrowed the money of her and made her out a deed to the place.

"Q. What did you do with the money? You say you borrowed money from her, did you spend it on the place?

"A. Yes, sir, for cows used to improve the place."

This is the entire testimony that was given on this branch of the case. It is reasonable to infer therefrom that though the deed which was executed by the plaintiff to his wife was absolute in form, it was intended by them when the sealed instrument was made, that it should be security for the payment of the money which he borrowed from her, the amount of which, the time of its payment, and the rate of interest not being disclosed. If the deed was executed under such circumstances, the legal title to the land did not pass by a delivery of the writing, which document was nothing more than a mortgage: *Adair* v. *Adair,* 22 Or. 115 (29 Pac. 193); *Marx* v. *La Rocque,* 27 Or. 45 (39 Pac. 401); *Security Savings and Trust Co.* v. *Loewenberg,* 38 Or.

159 (62 Pac. 647); *Kinney* v. *Smith*, 58 Or. 158 (113 Pac. 854).

4. Though the evidence fails to show what consideration was given by Mrs. Purdy for the land, it will be assumed without deciding the question, that her deed was intended to be absolute, and whether she gave only one dollar as stated in the instrument, or paid more than the defendant received for the land is unimportant, for the plaintiff was legally entitled to make such disposition of the real property as he pleased. As he paid for the premises $1,687 more than the land was worth at the price per acre as agreed upon, he is entitled to recover that sum by reason of the defendant's misrepresentations. No error was committed as alleged.

It follows that the judgment should be affirmed and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Argued September 25, modified October 3, 1917, motion to recall mandate denied January 8, 1918.

STATESMAN PUB. CO. *v.* FOLTIN.

(167 Pac. 782.)

Interpleader—Conflicting Claims—Nature.

1. The publisher of a number of periodicals offered prizes for the best solutions of a puzzle. After the close of the contest certain contestants claimed a number of the highest prizes, asserting that other contestants who submitted the four best solutions and three of whom were fellow countrymen, and related by blood or marriage, had violated the rules of the contest and were guilty of fraud or collusion, and that their solutions were the result of the individual efforts of one man. The contestants submitting these best solutions also claimed the prizes, and were only prevented from bringing actions therefor by an injunction in an interpleader suit brought by the publisher.

Held, that there was a proper case for entertaining a bill of interpleader.

[As to the right of interpleader, see note in 91 **Am. St. Rep.** 593.]

Rewards—Persons Entitled—Evidence.

2. In such suit of interpleader, evidence *held* insufficient to show fraud and collusion on the part of the contestants submitting the best solutions, though they were related, their method of procedure was substantially the same, and their results only slightly variant.

From Marion: WILLIAM GALLOWAY, Judge.

This is a suit by the Statesman Publishing Company, a corporation, against Frank Foltin and others, and is known as a bill of interpleader. The facts out of which this controversy arose appear in the statement by the court. Affirmed in part and modified in part.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This suit is in the nature of a bill of interpleader filed by plaintiff and arises out of substantially the following circumstances: The plaintiff is the publisher of the "Oregon Statesman," the "Pacific Homestead," "Northwest Poultry Journal," and the "Oregon Teacher's Monthly," all published at Salem, Oregon. About November 15, 1914, plaintiff submitted to its old and new subscribers for such publications a figure puzzle for solution. The puzzle, which is too intricate for full description here, consisted of certain combinations of numbers arranged in squares, and forty cash prizes of different amounts were offered to subscribers who should be able by continuous and nonintersecting lines to include the greatest aggregate of squares whose figures added together should produce the highest sum. Certain rules for the contest were published, but it appears that in some minor particulars they varied in the different publications. Such variance is not important here. The first prize was $300, and at the con-

clusion of the contest it was claimed by Frank Foltin and H. V. McClaen; McClaen claiming that Foltin had been guilty of fraud and collusion with other parties, and was, therefore, not entitled to receive the prize, although his diagram actually included the highest sum of figures. Stanislaus Janowski and Tillman each claimed the second prize of $175; Janowski's diagram showing the highest sum, but Tillman claiming fraud on Janowski's part, which he alleged disqualified him as a *bona fide* competitor. There was a like dispute on the same grounds between John Kieradlo and Mrs. B. Jones in relation to the third prize of $100, Kieradlo having the highest sum of figures; between Kieradlo and McClaen as to the fourth prize of $70; between McClaen and Mrs. Jones for the fifth prize of $40; and between Mrs. Jones and Tillman for the sixth prize of $25. The complainant alleged that it was ignorant of and unable to determine the respective rights of the parties; that the defendants were each threatening to bring an action at law against it for the respective prizes claimed; that the plaintiff had no claim upon the money, aggregating in all $710, and by its complaint tendered the money into court to be distributed among the claimants as the court might direct; that the respective defendants were accusing each other of fraud and collusion in their respective solutions of the puzzle and that plaintiff was unable to determine whether or not there was fraud or collusion on the part of any of the defendants. There was a prayer in the usual form asking that defendants be required to interplead concerning their claims, and that plaintiff be discharged from all liability upon paying the money into court. The defendants Foltin, Janowski, Czyz, and Kieradlo filed a general demurrer to the complaint, which was overruled, and they were required to answer. Whereupon they answered, ad-

mitting the offering of the prizes and their respective claims thereto, denying on information and belief that the other defendants were making any claims, respectively, to said prizes or charging them with fraud or collusion in making the same, and generally denying all other allegations of the complaint. By way of cross-complaint they alleged the offer of prizes by plaintiff, their compliance with the rules prescribed for the contest, and the fact that each has won the prize which he claimed and prayed for a distribution of the fund accordingly. It was further pleaded that the court had no jurisdiction, and that plaintiff by wrongfully bringing this suit had prevented them from bringing actions at law to recover upon their respective claims, and prayed that the suit be dismissed and that they be awarded $150, necessary attorneys' fees and costs. McClaen, Tillman, and Mrs. Jones answered setting up their respective claims to the prizes and charging the defendants Foltin, Janowski, Czyz, and Kieradlo with fraudulent practices in respect to the contest. That portion of the answer is as follows:

"8. That prior to the time fixed by the plaintiff for the submission of solutions to said figure puzzle, the defendants Frank Foltin, Stanislaus Janowski, Charles Czyz, and John Kieradlo fraudulently procured from some source or quarter unknown to the defendants answering herein a combination of numbers which would produce the largest results.

"9. That prior to said last mentioned time said defendants Frank Foltin, Stanislaus Janowski, Charles Czyz, and John Kieradlo fraudulently conspired together and agreed that each should use the same combination of numbers so fraudulently obtained, with a few minor exceptions, and by reason of said collusion obtain for the said Frank Foltin said first prize of $300; for the said Stanislaus Janowski said second prize of $175; for the said Charles Czyz said third

prize of $100; and for the said John Kieradlo the said fourth prize of $70.

"10. That in pursuance of said collusion and in order to cheat and defraud the defendants answering herein said defendants Frank Foltin, Stanislaus Janowski, Charles Czyz, and John Kieradlo submitted to said plaintiff their fraudulent solutions to said figure puzzle which were as follows: Frank Foltin, 330,229; Stanislaus Janowski, 330,224; Charles Czyz, 329,988; and John Kieradlo, 329,949.

"11. That the highest solution of said figure puzzle, made in accordance with the rules and regulations of said contest, were as follows: H. V. McClaen, 328,281; H. C. Tillman, 326,908; and Mrs. B. Jones, 226,099.

"12. That the said contest closed on the 15th day of January, 1915, and at said time and ever since said date there has been due, owing, and unpaid defendants, H. V. McClaen, $300, H. C. Tillman, $175, and Mrs. B. Jones, $100, which sums have not been paid nor any part thereof.

"13. That by reason of the fraud practiced by defendants Frank Foltin, Stanislaus Janowski, Charles Czyz, and John Kieradlo, as herein set forth, the defendants answering herein have been compelled to file an answer herein, and contest in this proceeding, to their damage in costs and attorneys' fees of approximately $125, and by reason thereof, have been deprived of the use of said $575 since said 15th day of January, 1915."

Motions to strike out portions of the answer and a demurrer to the same having been overruled, the defendant last above named filed a reply putting in issue the affirmative matter in the answer of McClaen, Tillman, and Jones, and the plaintiff filed a reply putting in issue the new matter in the answer of Foltin, Janowski, Czyz, and Kieradlo, thus putting the cause at issue. Before the trial the money in dispute was brought into court and paid over to the clerk. The court found in favor of plaintiff upon the issues as to

the interpleader; and found that the defendants Foltin, Janowski, Czyz, and Kieradlo had voluntarily conspired and agreed that each should use a combination of numbers fraudulently obtained, with a few minor exceptions; that the solutions obtained by them were the result of the individual efforts of one man; that the defendants violated the rules of the contest and the advertised rules of the plaintiff in so fraudulently conspiring together, and that said conspiracy was entered into by said defendants to cheat and defraud McClaen, Tillman, and Mrs. Jones. There were findings that the three latter were respectively entitled to the three highest prizes and that plaintiff had been unable to ascertain who was entitled to the fourth, fifth, and sixth prizes. There was a decree accordingly directing the clerk to pay over out of the fund deposited the sum of $300 to McClaen, $175 to Tillman, and $100 to Mrs. Jones, after deducting therefrom their proportion of the costs and disbursements, and the remaining $135, less the costs retained, to be repaid to plaintiff for distribution to whomever should be entitled thereto. From this decree defendants Foltin, Janowski, and Czyz appeal.

AFFIRMED IN PART. MODIFIED IN PART.

For appellants there was a brief over the names of *Mr. Carey F. Martin* and *Mr. Ivan G. Martin,* with an oral argument by *Mr. Carey F. Martin.*

For respondent there was a brief and an oral argument by *Mr. James G. Heltzel.*

For defendants H. V. McClaen, H. C. Tillman, and Mrs. B. Jones, there was a brief submitted over the names of *Messrs. McNary & McNary* and *Mr. Ralph D. Moores.*

No appearance for the other defendants.

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. The plaintiff both by pleading and proof has shown a good cause for interpleader. It is evident that with two claimants for each of the three principal prizes it would have exposed itself to a multiplicity of small actions in regard to the fund in its hands had it assumed to pay it to any set of claimants. The appealing parties admit in their answer that they claimed, respectively, the first three prizes and were prevented from bringing actions to recover them only by reason of the injunction issued in this suit. The three defendants who were successful in the court below earnestly contend in their pleadings and by their evidence that they, respectively, are entitled to the three principal prizes and that their competitors were guilty of such fraud and collusion as to disqualify them as claimants. We are of the opinion that the circumstances bring this case clearly within the rule announced in *Pope* v. *Ames,* 20 Or. 199 (25 Pac. 393), and in *North Pac. Lumber Co.* v. *Lang,* 28 Or. 246 (42 Pac. 799, 52 Am. St. Rep. 780), and that the decree of the court so rendered was correct as to this branch of the case. Kieradlo has not appealed so as to the issue between himself and McClaen and the next highest on the list nothing need be said, except so far as it arises incidentally in the course of the proceedings.

2. It appears from the evidence that "upon the face of the returns" the appealing defendants and Kieradlo stand higher than McClaen, Tillman, and Mrs. Jones, and unless these results are shown by the preponderance of the evidence to have been fraudulently obtained, they were entitled to receive the prizes. The evidence of fraud and collusion on their part is very slight. Foltin, Czyz, and Janowski are all natives of Poland. Foltin is married to Janowski's aunt and

is blood uncle to Czyz. At the time of the contest Janowski was an attendant at the Oregon Insane Asylum, Czyz was at Dee, in Hood River County, about one hundred miles distant, and Foltin, about seven miles from Salem. Kieradlo resided in Chicago, and is not shown to have been acquainted with the three appealing defendants, and they all deny acquaintance with or any knowledge of him. This relationship of the three appellants and the fact that they were the three highest contestants, that their method of procedure was substantially the same, and the results only slightly variant, is practically the only evidence of fraud or collusion between them. It was claimed that the handwriting on the prize slips was so similar as to indicate that they were all written by the same person, but an inspection does not disclose any greater similarity than would probably be found to exist in the handwriting of any two persons of the same nationality who had received an ordinary education. It is all of the angular type peculiar to continental Europe, and in our judgment there are many and controlling indications that each slip was written by a different person. As to the method used it appears that there were several thousand contestants, and, perhaps, a million methods which would comply with the terms of the contest producing greater or lesser results, but it is plain that there must have been only one method to produce the highest result, and the nearer a contestant could approximate to that the better the result he would obtain. It is in evidence that these parties had engaged in other contests of a similar character, and their testimony discloses an intelligent comprehension of methods by which high results may be secured. They were not living in the same house or the same town, and but two of them in the same vicin-

ity, and they all testify that they never conferred in any way in regard to the work they were doing. That they chose the same method of solving the proposition may be attributed either to their experience in former contests or to their close attention to the conditions of the problem. Fraud is never presumed; it must be proved; and it is not sufficient to establish fraud that a few detached circumstances susceptible equally of an innocent or a guilty construction should be shown. The evidence shows that Kieradlo resides in Chicago, and that none of the appealing defendants ever saw or heard of him until this action, and yet he pursued the same methods and approximated the same results. So far as indicated by the evidence he never conspired with the appellants or had an opportunity to do so, yet he is found to be a co-conspirator with appellants and they with him because he and they used what seems to have been the best method and thereby obtained the best results. While the fact that these three appellants are related either by marriage or by consanguinity, and that they each have achieved a high score in the contest and by similar methods, are circumstances calling for close scrutiny, we do not feel that they are sufficient to overcome the presumption of fair dealing with which the law invests every transaction until it is overcome by a preponderance of testimony to the contrary.

As to the plaintiff the decree of the Circuit Court is affirmed with costs. As to the defendants appealing the decree is reversed and one will be rendered in their favor as against the defendants McClaen, Tillman, and Mrs. Jones as prayed in their cross-complaint.

AFFIRMED IN PART. MODIFIED IN PART.

MR. JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued October 19, 1917, affirmed January 8, 1918.

HENDERSON v. TILLAMOOK HOTEL CO.

(169 Pac. 519.)

Appeal and Error—Reversal—Effect on Acts of Receiver.

1. Where petition for hotel receiver's appointment was included in complaint for accounting, and the allegations, if true, were sufficient to justify his appointment, which was made with notice and after defendants had answered, a subsequent holding on appeal that the trial court's action was erroneous, with direction that the receiver be removed, did not declare the appointment void, nor was it such in fact, so that the receiver was in no sense a trespasser.

Receivers—Authority.

2. A hotel receiver had authority to make purchases of supplies which would have been a necessary expense, even if there had been no receivership.

Receivers—Accounting.

3. A hotel receiver was entitled to credit for payments for supplies purchased, whether the merchants so paid applied the payments to the receiver's accounts for such supplies, or to prior unpaid balances of the hotel company, since both accounts were obligations of the hotel company.

[As to duty and power of receiver with respect to existing contracts, see note in Ann. Cas. 1912C, 949.]

From Tillamook: HARRY H. BELT, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is an appeal from a decree of the trial court settling the final account of the receiver appointed to take charge of the hotel property of the defendant corporation, with directions in the order of appointment

"to act as such until the further order of this court, with full power and authority to take immediate and exclusive charge of the business and affairs of said defendant corporation, and to manage the same according to the orders and directions of this court from time to time to be made herein, and to take such necessary steps as may be necessary to procure sufficient funds to meet and liquidate running and current expenses of

the defendant corporation, and pay the claim of A. H. Gaylord and the said C. J. Carlton, and any other urgent demands against the same, and is hereby given power and authority to negotiate a loan upon the credit of the defendant corporation and its assets, etc."

In obedience to this order the receiver took possession of the property on May 5, 1914, and conducted the business thereunder until August 2, 1914, when, upon the reversal of such order by this court (*Henderson* v. *Tillamook Hotel Co.*, 76 Or. 379 (148 Pac. 57, 149 Pac. 473), the receiver was removed and directed to return the property to the defendant corporation. Thereafter, an accounting was had wherein the trial court made and entered a decree thereon as follows:

"Based on the findings of fact and conclusions of law heretofore found and made in this cause, it is by the court ordered that the receiver A. H. Gaylord pay to the defendant Hotel Company the sum of $422.

"That the said Hotel Company thereupon transfer and assign to the said Gaylord all his claims and interest in the claim now shown upon its books against one E. F. Helliere for $133 on account of draft cashed by the said Gaylord while receiver.

"That the said A. H. Gaylord have and recover of and from the plaintiff in this cause for his services as receiver the sum of $455, the further sum of $79 for his services in keeping account of the receipts and disbursements of the defendant company prior to his being appointed receiver, and the further sum of $289 on account of said Gaylord and Carlton as expert accountants, the further sum of $32.15 for premium on bond, labor and expert accountant and for publication of notice of hearing of final report, and that this shall be a full, final and complete settlement of all matters herein connected with the said receivership."

From this decree defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. E. J. Claussen,* with an oral argument by *Mr. Duniway.*

For respondent, John Leland Henderson, there was a brief and an oral argument by *Mr. H. T. Botts.*

For respondent, A. H. Gaylord, there was a brief over the names of *Mr. H. T. Botts* and *Mr. Webster Holmes,* with an oral argument by *Mr. Botts.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. The evidence taken upon the accounting in this case is very voluminous, and is rendered vague and confused by what we deem an unnecessary elaboration of petty details. From it all, we gather that the receiver took charge of the property on May 5, 1914, at which time he received with the business cash to the amount of $132.40, bar supplies $1,034.72, and dining-room supplies $94.60. When he was removed on August 2, 1914, he returned to the defendant Hotel Company cash $654.97, bar supplies $1,221.29, and dining-room supplies $118.17. According to his own contention, he paid $2,504.37 of bills incurred by the defendants prior to his appointment, of which defendants concede the payment of $1,710.75. This discrepancy will be referred to later. He also incurred new obligations in conducting the business, which are still unpaid, to the amount of $2,336.81. The total cash receipts, including the money on hand on May 5, 1914, were $7,608.64 and the receiver accounts satisfactorily for $6,933.31, in the shape of necessary disbursements, in addition to the sum of $654.97 paid to defendants on August 2, 1914. The trial court properly disallowed

some of the disbursements and, as disclosed in the decree, ordered him to pay to defendants the further sum of $422 and gave judgment against the plaintiff for the receiver's compensation and other items of costs. The appeal of defendants appears to be based entirely upon the theory that the appointment of the receiver was a void act and as a necessary sequence that the receiver himself was a trespasser. This contention is without merit. The petition for the appointment was included in the complaint for an accounting and the allegations were sufficient, if true, to justify the action of the court. The appointment was made with notice and after the defendants had filed their answer. It is true that this court subsequently held that the action of the trial court was erroneous and directed that the receiver be removed: *Henderson* v. *Tillamook Hotel Co.*, 76 Or. 379 (148 Pac. 57, 149 Pac. 473), but did not declare the appointment void, nor was it so in fact. The decree was reversed because the evidence failed to support the allegations of the petition. This being true, it follows that the receiver is not in any sense a trespasser. In High on Receivers (2 ed.), Section 286, we find this statement of the law:

"An order appointing a receiver in a cause in which the court has full jurisdiction, affords protection to the receiver for all acts done under and in conformity with such order, even though it is afterward reversed for error."

This doctrine is supported by Beach on Receivers (Alderson's ed.), page 133. The court therefore very properly allowed as credits to the receiver, all disbursements made in paying the debts of the defendant corporation and in carrying on the business.

2. The discrepancy referred to, *supra*, arises from the fact that the receiver continued to do business with

certain firms who had accounts with the defendant corporation prior to the appointment, to whom there were unpaid balances due. New liabilities were thus incurred and the dispute arises upon the question as to whether subsequent payments to such firms were applied to the old or new obligations. The new accounts are a proper charge against the defendants, since the supplies thus purchased would have been a necessary expense, even if there had been no receivership: High on Receivers (4 ed.), § 809; *Ogden City* v. *Bear Lake etc. Irr. Co.*, 18 Utah, 279 (55 Pac. 385).

3. It follows that it can make no material difference to the defendants whether the payments in question were applied to the new or old accounts, since both are their obligations. We find no substantial error in the record and the decree is therefore affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE HARRIS and MR. JUSTICE MOORE concur.

Argued October 19, affirmed, modification authorized November 20, 1917, opinion further modified and rehearing denied January 8, 1918.

HORNBECK *v.* SMITH.*

(168 Pac. 633, 419.)

Vendor and Purchaser—Fraud—Evidence—Sufficiency.

1. Evidence *held* insufficient to show fraud on the part of defendants who contracted to convey land to plaintiff.

Vendor and Purchaser—Title—Encumbrances—Public Highway.

2. The existence of a visible and known physical encumbrance upon land contracted to be conveyed, such as a public highway, is not such

*On right to rescind or abandon contract because of other party's default, see note in 30 **L. R. A.** 33.

As to necessity for placing *in statu quo* on rescission of contract for sale of land, see note in 30 **L. R. A.** 66. REPORTER.

an encumbrance as renders the owner's title unmarketable; it being presumed that in fixing the purchase price the existence of such an easement was considered by the parties.

Vendor and Purchaser—Rescission—Burden of Proof—Fraud.

3. Where the purchaser sought to rescind a contract to purchase real estate on the grounds of fraudulent representations, he had the burden of pleading and proving all the operative elements of fraud.

[As to burden of proving fairness of transaction, see note in **Ann. Cas.** 1912A, 704.]

Vendor and Purchaser—Rescission—Duties of Parties.

4. A vendee desiring a rescission of a contract to purchase land must endeavor to restore the *status quo*, and to make some recompense for profits derived under the contract.

Vendor and Purchaser—Time for Rescission.

5. In order to secure a rescission of a contract to purchase land, the vendee must act promptly upon discovery of the alleged discrepancy in the number of acres actually conveyed.

From Marion: WILLIAM GALLOWAY, Judge.

Department 1. Statement by MR. JUSTICE BEAN.

In April, 1914, the defendants, J. P. Smith, B. M. Smith, and J. E. Smith, partners as Smith Brothers, were the owners of about 177 acres of land in the northern part of Marion County. About 147 acres of this tract are located east of the Willamette River and the remaining 30 acres, known as the island, lie west of the main channel of the river. This land was placed in the hands of Mr. Ferguson, a real estate agent at Newberg, for sale for $16,000. He initiated negotiations with plaintiff Hornbeck for the sale of the same, but as the latter did not desire any portion of the island a final proposition was accepted leaving it out and embracing only the 147 acres at the price of $15,400. The contract of sale was executed April 1, 1914, describing the land as two distinct parcels, title in fee simple to be conveyed upon payment of the purchase price as follows: $3,000 in cash, which was paid; $1,500 on the first day of November, 1914, and $1,500

on the first day of November in each year thereafter until the purchase price was fully paid, with interest at six per cent per annum on deferred payments. Hornbeck was to pay all taxes for the year 1914, and thereafter. Upon the execution of the agreement Hornbeck was to have possession of 20 acres of the land, and of the whole thereof on October 1, 1914, at the expiration of a certain lease in which he was substituted as lessor. The contract provided that in case of failure to make any of the payments, or the interest thereon, at the time provided therein, which was made the essence of the agreement, then Hornbeck should forfeit all his rights to the premises and the Smiths might reenter the same and retain all payments made.

On February 7, 1916, J. P. Smith, who had succeeded to the interest of his brothers in the land, brought an action against Hornbeck for the possession thereof. Hornbeck answered and also filed a cross-complaint in equity to restrain the action at law and prayed for the cancellation of the contract of sale and for the return of the $3,000, the first payment made upon the agreement, and $434, interest paid December 11, 1914. In his cross-complaint plaintiff Hornbeck set forth the contract and alleged, in substance that there was a deficiency of about 20 acres in the tract purchased; that at the time of the execution thereof and ever since neither of the vendors owned or possessed a parcel of said land consisting of about 12 acres and therefore cannot comply with the terms of the contract; that plaintiff was not familiar with the location of that portion of the premises and relied upon the representations of the Smiths; that they greatly exaggerated the value of the farm and falsely represented the proceeds that could be derived from the cultivation thereof.

Defendants J. P. Smith, B. M. Smith and J. E. Smith, who were made parties defendants upon the application of plaintiff, answered the cross-complaint and admitted the execution of the contract. They denied any misrepresentations or fraud on their part and averred that plaintiff failed to pay any of the principal due on April 1, 1914, or any interest, except $434 paid December 11, 1914, therefore, prior to the action defendant J. P. Smith declared the contract forfeited and demanded possession of the premises; that plaintiff was in possession of the land during the crop seasons of 1914 and 1915, without paying defendant anything for the use thereof, and neglected to pay the taxes assessed against the property for the year 1915; that by reason of the failure of plaintiff to perform the conditions of the contract he forfeited all right to the premises, or to a return of the $3,000, or the interest paid.

Plaintiff's reply put in issue most of the material allegations of the answer and averred that defendants delivered possession of only 103.89 acres of one tract, and 23.63 of the other. A decree was rendered in favor of defendants forfeiting all payments made by plaintiff and restoring defendant J. P. Smith's possession of the premises. Plaintiff appeals. Additional facts are stated in the opinion.

AFFIRMED. MODIFICATION AUTHORIZED.

For appellant there was a brief and an oral argument by *Mr. Grant Corby.*

For respondents there was a brief over the names of *Mr. John H. McNary, Mr. Ralph D. Moores* and *Mr. Everil M. Page,* with oral arguments by *Mr. McNary* and *Mr. Moores.*

MR. JUSTICE BEAN delivered the opinion of the court.

1. Plaintiff's complaint as to fraudulent representations on the part of the vendors is not sustained by the evidence. The averment in regard to a want of ownership of about 12 acres of the land contracted for refers to a piece surveyed and marked upon the plat in evidence as 10.15 acres in the shape of a portion of an L extending north from the western boundary of the main tract and down along the Willamette River immediately west of a Mr. Coyle's land. For several years the fences on the south and north of Coyle's land have extended past the strip to the Willamette River so as to embrace the same in his inclosure. This was done apparently to economize in fencing. An attempt was made to show that Coyle had gained title to this tract by virtue of the statute of limitations. He was a witness in the case and plainly stated that he had no use for this land; that he claimed only the land conveyed to him which was a part of the Coyle Donation Land Claim which was shown not to include the 10.15 acre piece, formerly state school land. In the negotiations for the sale, the farm was referred to as consisting of 147 acres. The main contention of plaintiff is that there is a shortage in the number of acres. After the action was commenced by Smith, plaintiff procured a survey of the land to be made which was delineated upon the map exhibited as containing in the aggregate 134.17 acres. While the land is all connected the acreage is computed in four parts, one of which has already been referred to. The larger parcel which is a part of the Coyle Donation Land Claim is nearly in the form of a rectangle. It is surveyed and marked on the plat as containing 103.89 acres. In the negotiations this tract was called 107 acres. Embraced therein is a road occupying 3.49 acres which was not included in

the survey. This, if added, would make a fraction over 107 acres, the estimated area.

2. It is held in this state that the existence of a visible and known physical encumbrance upon land contracted to be conveyed, such as a public highway, is not such an encumbrance as renders the owner's title unmarketable. It is a presumption that in fixing the purchase price the existence of such an easement was taken into consideration by the parties: Maupin on Marketable Title (2 ed.), 197; *Barnum* v. *Lockhart,* 75 Or. 528, 540 (146 Pac. 975); *Wetherby* v. *Griswold,* 75 Or. 468, 475 (147 Pac. 388); *Lombard* v. *Kies,* 79 Or. 355, 362 (154 Pac. 757). For aught that appears in the record plaintiff knew all about the county road. On the west of the 107 acres, between that tract and the Willamette River as surveyed, there are five acres. Adjoining the larger tract on the southwest is one formerly conveyed as 26 acres, which was surveyed as 15.63 acres. The first and two last pieces of land mentioned were conveyed as school lands by the state. In the contract the western boundary of this farm is written as following "the meandering of the channel of the Willamette River." It is in regard to the school lands bordering on the river that the main part of the shortage is claimed. When the survey was made for plaintiff the water of the river was at a high stage. It was surveyed to the edge of the water. The western portion of the land consists of timber lands, a part of which is very productive and a part, somewhat lower and sometimes overflowed which is of less value and is called "rough shore land."

The burden of proof is on the plaintiff to prove the allegations of his complaint.

In order to rescind a contract for the sale of real estate on the grounds of fraudulent representations plain-

tiff must plead and prove all the operative elements of fraud: *Rolfes* v. *Russel,* 5 Or. 400; *Dunning* v. *Cresson,* 6 Or. 241; *Wheelwright* v. *Vanderbilt,* 69 Or. 326 (138 Pac. 857).

3. The second parcel described in the contract by metes and bounds, being the school land, is referred to therein as "containing 40 acres more or less." The evidence does not show that this tract does not consist of approximately 40 acres, if surveyed at the ordinary stage of water in the Willamette River according to the boundary given in the contract of sale, or to the ordinary high-water mark of the river: See *Sun Dial Ranch* v. *May Land Co.,* 61 Or. 205 (119 Pac. 758). On the other hand, while the exact area according to such a survey is not given it is shown that it would make a great difference in the measurement if made to the stream and the evidence indicates that the land contained about 40 acres, and that the farm in the aggregate comprised approximately 147 acres. Mr. Hornbeck is an illiterate man, but does not appear to be ignorant of business matters. As an incident it appears that he made two visits to the farm in company with his son-in-law, Mr. Nelson, and Mr. Ferguson, the real estate agent. Upon the first visit, by mistake of memory or on account of error in listing the land for sale, Ferguson said there were thirty acres of hops on the farm, to which Mr. Hornbeck promptly replied, "Well, it ain't there." The agent did not know nor pretend to know the number of acres. Inquiry was made of Mr. Van Damm, the lessee then in charge of the place, and it was ascertained that the large hop-yard consisted of 18 acres.

It appears that in the negotiations the land immediately bordering on the water was not considered as valuable as the other land and that Hornbeck under-

stood this as he would not take the island, and a deduction of only $600 was made for this thirty acres. A proposition was pending between the parties for half a day for the agent to take the 10.15 acres which Hornbeck did not want at first as commission, and that the price be reduced to $400 upon such an arrangement.

It is shown that the farm was a fair bargain at the price agreed upon. It contains about 90 acres in cultivation, an eighteen-acre bearing hopyard, and a two-acre peach orchard. There is a residence on the property of the value of about $2,000, a barn, hop-house, dryer, and other farm buildings. During the five years prior to the contract the rental share received by the Smiths ranged from $1,100 to $2,907, averaging $2,096 per annum. It will be observed that the income varied widely in different years. It seems that the hopyard which was one of the best in that part of the county was largely relied upon for profit. After the contract of sale was made the price of hops declined and with that the income of the farm decreased. Unfortunately Mr. Hornbeck was unable to make his payments as agreed, and he tardily complained of the number of acres which he had ample opportunity to ascertain and which he apparently knew approximately at the time of the deal. He speculated on the cultivation of the farm for two seasons and offers the owner no rent or compensation therefor, but seeks a return of the first payment and of one interest payment made therefor.

4, 5. A vendor desiring a rescission of a contract of sale of land must endeavor to restore the *status quo* and make some recompense for profits derived under the contract: *Dundee Mortgage etc. Co.* v. *Goodman,* 36 Or. 453 (60 Pac. 3); *Crossen* v. *Murphy,* 31 Or. 114 (49 Pac. 858); *Clarno* v. *Grayson,* 30 Or. 111 (46 Pac.

426); *Frink* v. *Thomas,* 20 Or. 265 (25 Pac. 717, 12 L. R. A. 239). In order to secure a rescission of the contract of sale such a vendee must act promptly upon discovery of a discrepancy in the number of acres: *McCourt* v. *Johns,* 33 Or. 561 (53 Pac. 601); *Waymire* v. *Shipley,* 52 Or. 464 (97 Pac. 807); *Hewitt* v. *Andrews,* 69 Or. 581 (140 Pac. 437). It does not appear that the vendee was overreached or defrauded in making the contract.

In order that Hornbeck may have ample opportunity to comply with the terms of the contract and in view of the fact that upon the trial little attention was paid to the matter of notice to the plaintiff of the declaration of forfeiture by defendant, J. P. Smith, plaintiff Hornbeck should be allowed to apply to the Circuit Court within ten days from the filing in that court of the mandate herein to make payment of the amount due upon the contract of sale; and, in case of such application, he should be allowed ninety days or such time as the Circuit Court may deem reasonable under all the circumstances to make such payment. In the event of such payment or redemption the defendant, J. P. Smith, who appears to be in possession by tenant, should account to Hornbeck for the rents and profits during the time of such possession.

The decree of the trial court is affirmed with the authority for that court to make the modification upon application in accordance herewith; defendants to recover costs in this court.

AFFIRMED. MODIFICATION AUTHORIZED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Modified and rehearing denied January 8, 1918.

PETITION FOR REHEARING.

(168 Pac. 419.)

Former opinion modified. Petition for rehearing denied.

Mr. Grant Corby, for the petition.

Mr. John H. McNary, Mr. Ralph D. Moores and *Mr. Everil M. Page, contra.*

Department 1. MR. JUSTICE BEAN delivered the opinion of the court.

In our former opinion in this suit in order that Hornbeck might have an opportunity to comply with the terms of the contract he was permitted to apply to the Circuit Court within a certain time to make payment of the amount due upon the contract of sale of the land involved and in case of such application to be allowed 90 days or a reasonable time in which to make such payment. It was also held that in the event of such payment or exemption the defendant, J. P. Smith, who appeared to be in possession of the land, should account to plaintiff Hornbeck for the rents and profits during the time of such possession. In a petition for rehearing the plaintiff asks for a modification

"in order that the mandate or final decree rendered herein may authorize such supplemental proceedings in the court below sufficient to fully warrant and authorize a complete accounting."

In case of an application by plaintiff Hornbeck to make payment for the land or redemption thereof, the manner of the accounting authorized to be taken was not intended to be directed. Upon such application

being made and an accounting being taken the Circuit Court is at liberty to entertain such supplemental proceedings and make such investigations as may be deemed necessary and warranted by the equities of the case under the law. Except for this modification or explanation the petition for rehearing is denied.

AFFIRMED.

MODIFICATION AUTHORIZED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR JUSTICE HARRIS concur.

Submitted on briefs December 18, 1917, reversed January 8, 1918.

CITY OF ASTORIA *v.* MALONE.

(169 Pac. 749.)

Criminal Law—Appeal—Formal Defects.

1. The contention that the judgment of conviction should be affirmed, because defendant's counsel moved for a directed verdict instead of a verdict of not guilty, is without merit.

Statutes—Exceptions and Provisos—"Enacting Clause"—"Preamble."

2. The term "enacting clause" generally relates to a requirement in a Constitution or municipal charter demanding the use of a designated clause so as to give validity to a statute or ordinance, and what is generally designated the "enacting clause" of a statute is occasionally called the "preamble"; while a section of a statute denouncing an offense is sometimes spoken of as the "enacting clause."

[As to preamble as aid to the construction of a statute, see note in Ann. Cas. 1917C, 500.]

Intoxicating Liquors—Jurisdiction of Police Courts.

3. Under Laws of 1915, page 166, Section 32, providing that justices of the peace and other courts having jurisdiction as such shall have concurrent jurisdiction with the Circuit Court for violations of the act, police courts generally possess the same authority to hear and determine cases as Justice's Courts, and have concurrent jurisdiction with the Circuit Court of most violations of the prohibitory laws.

Intoxicating Liquors—Prosecutions Under Ordinances—Statutes Applicable.

4. Laws of 1915, page 166, Section 33, providing that it shall not be necessary for the state to allege that the party charged did not

have legal authority to sell such liquor, or was not within any of the exceptions of the act, has no application to a prosecution under a municipal ordinance.

Municipal Corporations—Ordinances Creating Misdemeanors.

5. A municipal enactment creating a misdemeanor can rise to no greater dignity or importance than a statute defining a crime of that class.

Indictment and Information—Supplying Omissions Unlawfully.

6. The use of the word "unlawfully" in a criminal accusation for a statutory misdemeanor cannot, in the absence of an enactment to that effect, supply the omission of a statement of facts necessary to show the commission of the offense.

Intoxicating Liquors—Negativing Exceptions—"Indictment."

7. Under ordinance making it unlawful to have in possession intoxicants "not permitted by the general laws of the State of Oregon," the quoted exception being a part of what is usually termed the "enacting clause" must be negatived, and a complaint not negativing such exception by appropriate language was demurrable in view of Section 2482, L. O. L., providing that a complaint is to be deemed an indictment within the provisions of Chapter 7 of Code of Criminal Procedure (Sections 1435–1460, L. O. L.), as to sufficiency of indictment.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

The defendant was accused by a verified complaint filed in the Police Court of the City of Astoria of violating the provisions of Ordinance No. 5025 of that municipality, which offense was alleged to have been committed as follows:

"That said Walter Malone, within the corporate limits of the City of Astoria, Clatsop County, State of Oregon, on the 26th day of August, 1917, then and there being, did have unlawfully in his possession intoxicating liquors, to wit: beer and wine, contrary to the ordinance in such case made and provided, and against the peace and good order of the said city of Astoria."

A demurrer to the charge, on the grounds that it did not state facts sufficient to constitute a crime or show an infringement of the designated ordinance, was over-

ruled and the defendant declining further to plead or offer any evidence was found guilty and appealed from the resulting judgment to the Circuit Court for that county where the cause was tried and when the testimony for the prosecution was received, the defendant, without offering any evidence, moved for a directed verdict in his favor, but the motion was denied and having again been found guilty, he appeals to this court from the judgment which followed.

Submitted on briefs under the proviso of Supreme Court Rule 18:56 Or. 622 (117 Pac. xi). REVERSED.

For appellant there was a brief submitted by *Messrs. Norblad & Hesse.*

For respondent there was a brief prepared and submitted by *Mr. Olaf Anderson,* City Attorney, and *Mr. O. B. Setters.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is insisted that the judgment rendered herein should be affirmed because the defendant's counsel moved for a directed verdict in favor of their client, instead of a verdict of not guilty. The court undoubtedly understood the purport of the motion, which application was not denied by reason of any indefiniteness therein as to the meaning intended to be conveyed. The point contended for is without merit.

This action was founded upon Section 5 of the ordinance mentioned, which provision reads:

"It shall be unlawful for any person, persons, firm, company or corporation to have in his, her, their or its possession within the corporate limits of the City of Astoria, any intoxicating liquor not permitted by the general laws of the State of Oregon."

It will be noted that the accusation herein omits the language "not permitted by the general laws of the State of Oregon," as set forth in the section quoted. Though a clause of the Constitution of Oregon, which became operative January 1, 1916, prohibits the manufacture or sale within this state of intoxicating liquors, except for medicinal, scientific, sacramental or mechanical purposes (Gen. Laws Or. 1915, p. 12), and another provision of the organic law inhibits the importation of such liquors for beverage purposes (Gen. Laws Or. 1917, p. 8), it is not violative of any enactment for a person to have in his possession intoxicating liquors which were lawfully procured and in his custody within this state, February 2, 1917, when Gen. Laws Or. 1915, p. 150, c. 141, § 5, was amended: Gen. Laws Or. 1917, p. 46, c. 40. Thus, if the wine and beer charged to have been in the defendant's possession were secured by him on or prior to February 2, 1917, and he was then in custody thereof within this state, no crime was committed by having possession of such beverages. This is the only instance in which the possession of beer could legally have been secured or held at the time alleged in the complaint.

"It shall be lawful for any priest or minister of any church or religious congregation in this state, using wine in administering the sacrament to receive from any common carrier such reasonable quantity of wine as may be necessary for sacramental purposes only, to be imported into this state under permit of the district attorney for the county in which such church or congregation holds its meetings": Gen. Laws Or. 1917, p. 46, c. 40, § 12.

If, therefore, the defendant was a priest or minister as thus described, or a common carrier who had imported for such clergyman wine pursuant to a permit regularly issued therefor, no crime was committed in

having possession within this state of any reasonable quantity of wine for sacramental purposes.

Ethyl alcohol may also be legally imported, kept, sold and delivered for medicinal, scientific or mechanical purposes within Oregon: Gen. Laws Or. 1915, p. 12; Gen. Laws Or. 1915, p. 150, c. 141, § 6, as amended by Gen. Laws Or. 1917, p. 46, c. 40. As neither wine nor beer comes within that class of intoxicating liquor, it is unnecessary to refer to the instances in which the possession of such alcohol can legally be held. It is contended that the complaint herein does not state facts sufficient to constitute a crime or to show a violation of the provisions of Ordinance No. 5025, in that the accusation does not negative these exceptions to the general prohibition law, by alleging that not having in his possession within this state on February 2, 1917, any alcoholic stimulants, nor then being a priest or minister of any church or religious congregation in Oregon, using wine in the administration of the sacrament, nor a common carrier importing into this state under permit of the district attorney of the county in which such church or congregation holds its meetings, any wine the defendant at, etc., on etc., did unlawfully have in his possession intoxicating liquors, to wit, beer and wine, contrary, etc.

In *State* v. *Tamler,* 19 Or. 528, 530 (25 Pac. 71, 9 L. R. A. 853), in speaking of an accusation charging a violation of the provisions of a statute creating a misdemeanor and containing excepted clauses, Mr. Justice BEAN remarks:

"The general rule on this subject, is that where the exception or proviso is stated in the enacting clause, it is necessary to negative them in order that the description of the offense may in all respects correspond with the statute; but where such exception or proviso is contained in another or subsequent section of the

statute, it is a matter of defense and need not be negatived in the indictment."

To the same effect see *Binhoff* v. *State,* 49 Or. 419 (90 Pac. 586); *State* v. *Carmody,* 50 Or. 1 (91 Pac. 446, 1081, 12 L. R. A. (N. S.) 828); *State* v. *Eisen,* 53 Or. 297 (99 Pac. 282, 100 Pac. 257); *State* v. *Atwood,* 54 Or. 526 (102 Pac. 295, 104 Pac. 195, 21 Ann. Cas. 516); *State* v. *Edmunds,* 55 Or. 236 (104 Pac. 430); *State* v. *Runyon,* 62 Or. 246 (124 Pac. 259); *State* v. *Sommer,* 71 Or. 206 (142 Pac. 759); *State* v. *Aplin,* 81 Or. 621 (160 Pac. 538). See, also, 12 Stand. Ency. Proced. 458; *United States* v. *Cook,* 84 U. S. 168 (21 L. Ed. 538).

2. The term "enacting clause" as used in the language last quoted seems to have caused some misapprehension of the meaning intended to be conveyed. Such phrase generally relates to a requirement in a Constitution or a municipal charter demanding the use of a designated clause so as to give vitality to a statute or an ordinance, without the employment of which such enactments are usually regarded as inefficacious: 26 Am. & Eng. Enc. Law (2 ed.), 560; 36 Cyc. 967. In commenting upon the parts of a legislative enactment, a text-writer observes:

"A statute has, or may have, a title, preamble, and purview. The purview is what follows, 'Be it enacted' etc., and includes the entire statute, except the title and preamble": 2 Bishop's New Crim. Proc., § 634.

It will thus be observed that what is generally designated as the "enacting clause" of a statute is occasionally called the "preamble," while a section of a statute denouncing an offense is sometimes spoken of as the "enacting clause": *State* v. *Runyon,* 62 Or. 246 (124 Pac. 259).

3, 4. Police Courts in Oregon usually possess the same authority to hear and determine cases as Justices'

Courts, and have concurrent jurisdiction with the Circuit Court of most violations of the provisions of the prohibitory laws: Gen Laws Or. 1915, p. 150, c. 141, § 32. In the prosection of actions founded upon that statute

"it shall not be necessary in the first instance, for the State to allege or prove that the party charged did not have legal authority to sell such liquor, or was not within any of the exceptions provided by this Act": Gen. Laws Or. 1915, p. 150, c. 141, § 33.

"All fines, costs, forfeitures on bonds, penalties or other sums collected in prosecutions under this Act, shall be paid at once into the county treasury to be applied to such funds as the county court may direct": Gen. Laws Or. 1915, p. 150, c. 141, § 25.

This action is not prosecuted by the state, nor is it based upon an alleged violation of the provisions of the statute referred to, but it is brought by the City of Astoria and predicated upon an averred transgression of an ordinance, which enactment was probably adopted to divert the sums of money exacted as fines for violations of the prohibition law from the county treasury and to cause the payment thereof to be made to the city treasurer for the benefit of that municipality. The provisions of Gen. Laws Or. 1915, p. 150, c. 141, Section 33, relating to the manner of pleading an alleged violation of the provisions of the prohibition law, can have no application whatever to the prosecution of an action for an alleged violation of a municipal ordinance.

Section 5 of Ordinance No. 5025 is complete within itself, and the description of the offense as there given, usually called in criminal parlance the "enacting clause," contains the proviso "not permitted by the General Laws of the State of Oregon," which language

is not an independent sentence, but forms an exception to a part of that municipal enactment.

It has been held that a criminal accusation is sufficient if it follows the language of the statute, denouncing a misdemeanor and clearly informs the defendant of the nature and cause of the offense charged against him: *State* v. *Shaw,* 22 Or. 287 (29 Pac. 1028); *State* v. *Koshland,* 25 Or. 178 (35 Pac. 32); *State* v. *Thompson,* 28 Or. 296 (42 Pac. 1002); *State* v. *Carmody,* 50 Or. 1 (91 Pac. 446, 1081, 12 L. R. A. (N. S.) 828); *State* v. *Miller,* 54 Or. 381 (103 Pac. 519); *State* v. *Edmunds,* 55 Or. 236 (104 Pac. 430); *State* v. *Townsend,* 60 Or. 223 (118 Pac. 1020); *State* v. *Billups,* 63 Or. 277 (127 Pac. 686, 48 L. R. A. (N. S.) 308); *State* v. *Scott,* 63 Or. 444 (128 Pac. 441); *State* v. *Underwood,* 79 Or. 338 (155 Pac. 194); *State* v. *Mishler,* 81 Or. 548 (160 Pac. 382).

5. A municipal enactment creating a misdemeanor can rise to no greater dignity or importance than a statute defining a crime of that class, and if the complaint herein had followed the language of Section 5 of Ordinance No. 5025, by inserting the omitted words, "not permitted by the general laws of the State of Oregon," a different question would have been presented.

In a criminal action commenced in an inferior court,

"The complaint is to be deemed an indictment within the meaning of the provisions of chapter VII of the code of criminal procedure (Title XVIII), prescribing what is sufficient to be stated in such pleading, and the form of stating it": Section 2482, L. O. L.

This requirement makes a verified complaint filed in an inferior court, charging the commission of a misdemeanor created by statute, equivalent to and as important as an indictment returned to the Circuit Court.

It will be remembered that Section 5, Ordinance 5025, reads:

"It shall be unlawful for any person * * to have in his possession * * any intoxicating liquor."

It will also be kept in mind that the accusation herein charges that the defendant

"did have unlawfully in his possession intoxicating liquors, to wit: beer and wine, contrary to the ordinance," etc.

A text-writer explaining when the word "unlawfully" should be used in a criminal accusation, says:

"When the statute creating an offense makes certain acts criminal when 'unlawfully' done, an indictment or information therefor must allege the acts charged were done 'unlawfully' or use words of equivalent meaning and import": 12 Stand. Ency. Proced. 408.

Another author illustrating when the expression "unlawfully" should be employed in a criminal charge observes:

"But if a statute, in describing the offense which it creates, uses the word, the indictment founded on the act will be bad if it be omitted; and it is generally best to resort to it, especially as it precludes all legal cause of excuse for the crime": 2 Bishop's New Crim. Proced., § 503.

6. The use of the word "unlawfully" in a criminal accusation for a statutory misdemeanor cannot, in the absence of an enactment to that effect, supply the omission of a statement of facts necessary to show the commission of the offense.

"When it is necessary to allege a negative, it is sufficient if such allegation follows the language of the statute, or is in words of equivalent meaning": 14 Stand. Ency. Proced. 369.

7. In this instance the accusation did not negative the exception specified in the municipal enactment, nor did the charge follow the language of the ordinance or use words of similar import. The failure of the city attorney thus to plead rendered the accusation vulnerable to the demurrer, and an error was committed in denying the motion of the defendant's counsel to grant the requested verdict.

It follows from these considerations that the judgment is reversed and the cause remanded for such further proceedings as may be necessary not inconsistent with this opinion. REVERSED.

Motion to dismiss appeal allowed January 8, 1918.

DOANE v. STEIN.

(169 Pac. 781.)

Appeal and Error—Right of Appeal—Small Claims Actions.

1. Since Laws of 1913, page 732, providing for District Courts, and Laws of 1915, page 517, providing for a "small claims department" in such courts, make no provision for appeal in such small claims actions beyond the Circuit Court, no appeal lies to the Supreme Court, the right of appeal being purely statutory.

From Multnomah: ROBERT G. MORROW, Judge.

On motion to dismiss.

Statement by MR. CHIEF JUSTICE MCBRIDE.

This case was begun in September, 1915, in the small claims department of the District Court of Multnomah County for the recovery of the sum of $15. The plaintiff having recovered judgment, the defendant appealed to the Circuit Court, wherein a trial was had in July, 1916, resulting in a judgment for plaintiff for $15 and

costs and disbursements. Thereupon defendant prosecuted an appeal to this court. Plaintiff moves to dismiss the appeal. MOTION ALLOWED.

Mr. William La Force, for the motion.

Messrs. Wood, Montague & Hunt and *Mr. Prescott W. Cookingham, contra.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. Chapter 355, Gen. Laws Or. 1913, provides for District Courts in all cities containing one hundred thousand or more inhabitants, and prescribes their jurisdiction. Chapter 327, Gen. Laws 1915, provides that wherever such District Courts shall have been established there shall be a department thereof known as the small claims department, which shall have jurisdiction, but not exclusive, in cases for the recovery of money where the amount claimed does not exceed $20.

The action is commenced by the plaintiff appearing and verifying the claim and paying a fee of seventy-five cents, whereupon the clerk issues summons directed to the defendant and requiring him to appear at a time therein specified, which shall not be less than five nor more than ten days after service of the notice, or upon failure to so appear judgment will be taken against him. No attorney or other person than the plaintiff or defendant is permitted to concern himself with the litigation without the permission of the judge, and the proceedings are wholly informal no pleadings being required, "with the sole object of dispensing speedy and quick justice between the litigants."

The judgment of the court is conclusive upon the plaintiff but it is provided that,

"if the defendant is dissatisfied he may within five days from the entry of such judgment against him, appeal to the Circuit Court of the county in which said court is located and if final judgment is rendered against him in such Circuit Court, then he shall pay in addition to said judgment the costs and attorney's fees to the plaintiff in the sum of Fifteen Dollars."

No provision is made in the act for any further appeal.

The right of appeal in this state is purely statutory and only exists where given by statute: *Town of La Fayette* v. *Clark*, 9 Or. 225. Actions in the small claims department of District Courts are *sui generis* and are not subject to the rules providing for appeals from Justices' Courts. The issues to be tried are purely oral and while the Circuit Court is permitted to require such further information as it may deem necessary for a proper reconsideration of the case, it is manifest that this court cannot pursue that course. We have nothing before us except the claim of the plaintiff and the findings of the Circuit Court, from which findings it would appear that plaintiff's demand was somewhat in the nature of a claim for money had and received.

It certainly was not in the legislative mind and contrary to its expressed intent to "dispense speedy and quick justice between the litigants" that these petty controversies wherein the issues are oral, should be prolonged by repeated appeals. It is in fact impossible to get the whole case here upon appeal, and an inspection of the record in this particular case indicates that in any event we should be compelled to affirm the judgment, should we assume jurisdiction.

The appeal will be dismissed.

MOTION ALLOWED. APPEAL DISMISSED.

Submitted on briefs September 18, affirmed September 25, 1917, rehearing denied January 15, 1918.

SMITH *v.* ROBINSON.

(167 Pac. 569.)

Trial—Direction of Verdict—Uncontradicted Evidence.

1. In an attorney's action for compensation, where there was no counterclaim and no dispute in material testimony, and there could reasonably be no difference of opinion as to inferences deducible from the evidence, a directed verdict was proper.

[As to what is deemed to be invasion by the court of the jury's province, see note in 14 Am. St. Rep. 36.]

From Josephine: FRANK M. CALKINS, Judge.

This action to recover money for services as attorney was commenced by Robert G. Smith against Emma G. Robinson. The trial judge directed the jury to return a verdict in favor of the plaintiff and from the judgment rendered thereon, defendant appealed. Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). Affirmed.

For appellant there was a brief over the name of *Messrs. Crawford & Crawford.*

For respondent there was a brief over the name of *Mr. Asa C. Hough.*

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

This is an action for money commenced in a Justice's Court in Josephine County. The cause was appealed to the Circuit Court. Judgment went for the plaintiff in both courts and the defendant appeals.

The complaint alleges that between January 1, 1910, and July 1, 1910, plaintiff performed services for the

defendant as an attorney at law of the reasonable value of $100, no part of which has been paid.

The defendant filed an answer denying each and every allegation thereof and denying that said alleged services were worth any sum whatever to her. The cause was tried before the court and jury. Evidence was introduced by plaintiff and several witnesses to the effect that the services were performed as alleged and were reasonably worth from $100 to $250; that while the case in which the services were rendered by the attorney was decided adversely to Miss Robinson by the trial court, on appeal to this court she won the case upon the question presented and the record made by the plaintiff as her attorney. In opposition to this evidence defendant testified as follows:

"I admit that he rendered me services of one hundred dollars. On the other hand I claim that really he owes me damages for not having this receiver dismissed."

At the close of the case the court directed a verdict for the plaintiff.

We have carefully read all the testimony and find none that disputes or refutes the evidence of plaintiff so as to raise any issue to be submitted to the jury. The answer consists of a general denial. There is no counterclaim pleaded; there is no dispute in the testimony as to the material facts; and there can reasonably be no difference of opinion as to the inferences and conclusions deducible from the evidence so as to require the jury to pass upon the same. The judgment is affirmed. AFFIRMED. REHEARING DENIED.

Argued October 30, reversed November 20, 1917, rehearing denied January 15, 1918.

BELL & CO. *v.* VOGT.

(168 Pac. 724.)

Corporations—Assignments for Creditors—Officer's Lack of Authority to Execute.

1. Where a corporation never authorized its president and secretary to execute an assignment of assets for the benefit of all creditors, the document executed by them is of no force and effect.

[As to necessity of action by directors to validate corporate act, see note in Ann. Cas. 1912C, 300.]

Corporations—Assignments for Creditors—Pleading—Admission.

2. In suit wherein an accounting was sought from the alleged trustee of an insolvent corporation, a paragraph of the answers, reading that on or about a certain date the company was indebted to various creditors in various sums of money, and orally requested defendant, through its officers, to receive any moneys that might be collected by the collector for the corporation, and to pay them out to various creditors, which defendant orally agreed to do, did not admit an assignment for the benefit of all creditors or any particular creditor, and contained nothing whereon to base claim against defendant, alleged trustee.

Corporations—Assignments for Creditors—Suit for Accounting from Alleged Trustee—Burden of Plaintiff.

3. To give a creditor seeking an accounting from the alleged trustee of an insolvent corporation any standing in court in such a suit, the creditor must establish a valid assignment for creditors by the corporation, in which the creditor has a beneficial interest.

From Wasco: WILLIAM L. BRADSHAW, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is a suit wherein an accounting is sought from the alleged trustee of an insolvent corporation. The substance of the complaint is that the defendant corporation, being insolvent, made a written assignment of all its assets to defendant Vogt for the benefit of all its creditors; that the latter accepted the trust, collected large sums of money, but failed to disburse the same in accordance with the terms of the trust, and refuses to account for the same; that he has disbursed

a portion of such money contrary to the agreement and has turned over a large part of the money to defendant Sumner, who threatens to pay it out to persons who are not creditors of the corporation. It is also alleged that plaintiff is a creditor of the corporation and brings this suit in its own behalf and for all other creditors similarly situated. The prayer is for an accounting by the trustee, and by the defendant Sumner, the appointment of a new trustee, and a judgment for the amount of its debt.

The defendants Vogt, The Sumner Fruit & Produce Company and J. G. Sumner filed separate answers, each containing some denials and two affirmative defenses, the first of which contains this paragraph:

"That on or about the 21st day of May, 1915, the defendant, The Sumner Fruit & Produce Company, a corporation, was indebted to various creditors in various sums of money, and on or about said date, was the owner of a small amount of property and of some notes and accounts, and on or about said time, the defendant corporation, through its officers, orally requested this defendant to receive any moneys that might be collected by the collector for said corporation, and pay out the same to various creditors thereof, and this defendant orally agreed so to do and it was further orally agreed that an officer of the company, to wit: one Alan Bancroft, should collect said account and that this defendant should not have anything to do with the collection thereof."

The other allegations of the answers are not essential to the decision here.

A reply was filed and a trial was had wherein, when plaintiff rested his case, defendants moved for a nonsuit which was denied, whereupon defendants rested their case without offering any evidence and a decree was made and entered in favor of plaintiff from which defendants appeal. REVERSED. DECREE RENDERED.

For appellants there was a brief and an oral argument by *Mr. Robert R. Butler.*

For respondent there was a brief and an oral argument by *Mr. William H. Wilson.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. The one question for our consideration arises upon the action of the trial court in denying the motion for a nonsuit. The plaintiff's evidence discloses that on May 21, 1915, the president and secretary of the defendant corporation undertook to make an assignment of all of its assets for the benefit of all its creditors. This action, however, did not have the authority of the board of directors. Defendant Vogt did receive moneys collected by Alan Bancroft, secretary and manager of the corporation, to the amount of $790.60 of which Vogt applied $470.75 to the payment of the claims of certain specified creditors, leaving a balance of $319.85 which he turned over to defendant Sumner, as president of the corporation. The only evidence of any assignment for the benefit of creditors which was introduced by plaintiff was the attempted written assignment above mentioned. This instrument cannot avail the plaintiff as the foundation of its suit, for the reason that it affirmatively appears from a reading of the evidence that the corporation had never authorized its president and secretary to execute the same and it has been decisively held by this court that under such circumstances the document is of no force or effect: *Luse* v. *Isthmus Transit R. Co.*, 6 Or. 125 (25 Am. Rep. 506); *Wilson* v. *Investment Co.*, 80 Or. 233 (156 Pac. 249).

2, 3. Plaintiff urges, however, that proof of the assignment is not necessary for the reason that the several answers expressly admit an oral agreement to the same effect, and to establish this contention it points to the paragraph quoted *verbatim* in the statement, *supra*. We have read the so-called admission with great care and all that we can find therein is the averment that the defendant Vogt agreed to receive moneys collected by the corporation's collector and apply it to the payment of various creditors. There is nothing contained therein which admits an assignment for the benefit of all or of any particular creditor and nothing upon which the plaintiff could base a claim against the alleged trustee. To give the appellant any standing in court in a suit of this character, it must establish a valid assignment in which it has a beneficial interest. Failing to do this, the nonsuit should have been granted. The decree is reversed and one will be entered in accordance with the views expressed.

REVERSED. DECREE RENDERED.
REHEARING DENIED.

Argued November 22, affirmed December 11, 1917, rehearing denied January 15, 1918.

BUTTLE *v.* DOUGLAS COUNTY.*

(168 Pac. 1180.)

Highways—Defects—Personal Injuries—Burden of Proof.

1. Under Section 6375, L. O. L., giving persons injured on county highways a right of action, one injured by defects in highway must, to recover, prove that he was lawfully traveling thereon; that he was injured by reason of a defect therein; that his own negligence did not contribute to such injury; that he had no knowledge of the defect or dangerous condition of the highway.

*On liability of counties for torts and negligence as to highways, see note in 39 **L. R. A.** 53. REPORTER.

Highways—Personal Injuries—Liability of County—Dirt Roads.

2. Section 6375, L. O. L., giving persons injured on county highways a right of action, on account of defects, applies to any county road, regardless of material, and so applies to dirt roads; it being the duty of the county to keep its highways in a reasonably safe condition, whatever the material used.

Highways—Personal Injuries—Liability of County—Dirt Roads—Questions for Jury.

3. Evidence *held* to present question for jury whether driver of stage-coach, which tipped over owing to deep mudhole in highway and injured plaintiff, was negligent.

Highways—Personal Injuries—Action—Issues.

4. Where plaintiff alleged injuries on a duly and legally established county road, and the answer so admitted, no issue as to whether the road was established by prescription could be tried, in the absence of allegation to such effect.

Highways—Personal Injuries—Question for Jury.

5. In action for injuries when stage-coach tipped over, due to mudhole, in county highway, where evidence warranted finding that neither plaintiff nor the driver was negligent, and that the road was defective, there was no error in denying nonsuit.

From Lane: GEORGE F. SKIPWORTH, Judge.

This is an action by R. M. Buttle against Douglas County, to recover for personal injuries in which a verdict was returned and judgment entered in favor of plaintiff and defendant appealed. Affirmed.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action for personal injuries occasioned by a defective highway. The cause was tried by the court and the jury and a verdict rendered in favor of the plaintiff for $1,300. From the ensuing judgment the defendant appeals.

The complaint alleges to the purport:

(1) That defendant is a public corporation.

(2) That it has control of the county roads and it is its duty to keep them in a safe condition and to give warning if the roads are unsafe.

(3) That there is a county road duly and legally established between Drain and Scottsburg in that county.

(4) That on April 11, 1913, plaintiff was traveling over this road in pursuit of his lawful business.

(5) That the road had fallen into disrepair and was dangerous to travel thereon in that it was cut up with large ruts.

(6) That the defendant knew this but took no steps to repair it or to warn the public of the danger.

(7) That the plaintiff had no knowledge of the defect or danger, and was not guilty of any negligence.

(8) That plaintiff was injured by reason of the defective condition of the road, setting forth his injuries and his damages.

Defendant demurred to the complaint and after the same was overruled answered and admitted the first, second, third and fourth allegations thereof, denied the dangerous condition of the road or that the defendant knew of it, denied the injuries and damages, and further set up that plaintiff's injury was sustained by reason of his own negligence in attempting to jump from the stage-coach, and by the fault and negligence of the stage line upon which he was traveling.

The new matter of the answer was put in issue by the reply. At the close of plaintiff's case defendant asked for a nonsuit. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George Neuner, Jr.,* District Attorney.

For respondent there was a brief over the names of *Mr. C. A. Hardy, Messrs. Huston & Huston* and *Mr. William W. Cardwell,* with an oral argument by *Mr. Hardy* and *Mr. Samuel B. Huston.*

MR. JUSTICE BEAN delivered the opinion of the court.

Section 6375, L. O. L., provides:

"Whenever any individual, while lawfully traveling upon any highway of this state or bridge upon such highway, the same being a legal county road, shall, without contributory negligence on his part, and without knowledge upon his part of the defect or danger, sustain any loss, damage, or injury in consequence of the defective and dangerous character of such highway or bridge, either to his person or property, he shall be entitled to recover of the county in which such loss, damage, or injury occurred, compensatory damages, not to exceed the sum of $2,000 in any case. * * "

1. Under this legislative enactment it is incumbent upon the plaintiff before he can recover for an injury caused by a defective and dangerous condition of a county highway to prove that he was lawfully traveling thereon; that he was injured by reason of a defect therein; that his own negligence did not contribute to such injury; that he had no knowledge of the defect or dangerous condition of the highway: *Bailey* v. *Benton County,* 61 Or. 390, 395 (111 Pac. 376, 122 Pac. 755); *Gigoux* v. *Yamhill County,* 73 Or. 212, 218 (144 Pac. 437).

2. The motion for a nonsuit requires an examination of the proof to ascertain if these prerequisites were complied with on the part of the plaintiff. In our opinion he produced plain evidence tending to show each of the conditions specified and to advance the case to the jury. The defense claimed herein is largely theoretical and not based upon the facts which the testimony tended to show. It is asserted by the defendant that the law does not apply to dirt roads; but with this contention we are unable to agree. It is the duty of a county to keep its highways in a reasonably

safe condition whatever the material may be with which they are constructed. Indeed, the evidence in this case tended to show that there was an entire lack of construction of the road at the place of the accident, but that the ground was left in its natural condition and that the same was wholly unfit and dangerous for travel thereover. The jury so found.

It is contended by counsel for defendant that the stage company was negligent and liable for the injury to plaintiff, and not the defendant county. If his injury was caused by the negligence of the stage company then that claim would seem to be tenable. The evidence tended to disclose the following state of facts: The plaintiff in the course of his occupation was lawfully traveling and riding in a stage along a county road between Drain and Scottsburg in Douglas County. The vehicle came to a large mudhole in the road with rails sticking up at an angle in the ruts which were from 12 to 18 inches deep. To avoid this the driver, who was proceeding carefully in a walk, turned out to the right the width of the stage and drove for a distance, estimated from 120 feet to 150 yards, until he approached a small ravine where there was a culvert across the road. In order to cross the same he was obliged to turn back into the old track where it was muddy to a depth of 3 or 4 inches. In doing so the left front wheel of the stage-coach dropped into a "hole in the road or rut" from 12 to 18 inches deep causing it to tip over injuring the plaintiff severely. The road was at the time and place in a dangerous condition. At the sides of the track the ground was about 18 inches higher than the track itself which had eroded owing to there being no drainage or ditch. It was thought by the driver that one wheel struck a loose rock.

3. In charging the jury the trial court made it plain to them that in order to recover plaintiff must prove that there was a defect in the highway and that this defect was the proximate cause of the injury; that the injury sustained by the plaintiff was caused solely and entirely by the defective and dangerous condition of the highway; and that if any other cause contributed to the injury they must find for the defendant. Under the evidence in this case and guided by these instructions the question of the negligence of the driver of the stage-coach contributing to the injury was one for the jury and it was set at rest by their verdict. From the evidence the jury could reasonably find that the stage driver was driving in a careful manner and was not negligent in turning out of the usual traveled track but necessarily did so in order to proceed along the journey and avoid the dangerous mud-hole in one of the old tracks; and that there was no negligence on the part of the stage company which contributed to the injury. It appears that at that part of the road there were five different tracks which had been traveled.

4. Again, it is urged in behalf of the defendant that the evidence does not show a defective or dangerous condition of the road, and that the accident did not occur in the county road; that the highway was established by user and extended in width no farther than the use which created it. In the first place we do not think that the admission of the defendant county as to the legally established road leaves any issue to be tried in regard thereto, but that it must be considered in the absence of any allegation to the contrary that the road was established in the usual manner. However, the question as to the propriety of the driver in turning out of one of the beaten tracks all depended upon the

condition of the road when he reached the large mud hole. All the conditions and circumstances relating thereto were fully explained to the jury and were passed upon by that tribunal under proper instructions by the court. That the county road was in a defective and almost impassable condition is shown beyond any controversy. The case cited by the learned counsel for defendant, *Stricker* v. *Town of Reedsburg,* 101 Wis. 457 (77 N. W. 897), does not support the theory that the turning out of a vehicle from the usual traveled track of a highway established by prescription in order to avoid a defect in such road would be negligence, but is authority for the reverse. In the precedent cited it was found that the road mentioned was in good condition for a width of 26 feet and that the diversion was voluntary and without necessity; while in the case at bar the evidence tended to show that the driver turned out from the beaten track to avoid a large mudhole which travelers had evidently attempted to temporarily repair by placing rails in the ruts which rails the vehicle had caused to stand at an angle; and that it was necessary for the driver to make such diversion.

5. A careful examination of the record does not disclose any error in the admission of evidence. The case was fairly tried and submitted to the jury upon proper instructions. There was no error in denying the motion for a nonsuit and we find none in the trial of the cause. The judgment of the lower court is therefore affirmed. AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Submitted on briefs October 29, reversed and remanded December 18, 1917, opinion sustained on petitions for rehearing January 15, 1918.

STILLWELL *v.* HILL.*

(169 Pac. 1174.)

Sales—Action for Price—Affirmative Denial.

1. In action for hay sold, a denial that more than a certain part of the hay was delivered, and an affirmative allegation that plaintiffs failed to deliver the balance of the hay contracted for, amounted to no more than an affirmative denial, and not pleading, as a counterclaim or defense, damages occasioned by breach of the contract to deliver all the hay.

Judgment—Matters Concluded.

2. When the second action between the same parties is upon a different claim or demand or cause of action, the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined, whether the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive *per se*.

Judgment—Matters Concluded.

3. The omission to take advantage of matter of counterclaim as a defense is no bar to a cross or separate action upon it, so that, though, the cross-claim be admissible by way of defense, the defendant has an option to avail himself of it in that form, or to sue upon it in another action.

Judgment—Splitting Defenses.

4. Defendants in action for hay sold could elect whether they would, in that action, plead and recover on their counterclaim for damages for failure of plaintiffs to deliver all the hay contracted for, or deny the delivery and bring an independent action for damages resulting from failure to deliver.

[As to who must bear the loss when the property is lost after sale but before payment, see note in 22 **Am. St. Rep.** 866.]

Judgment—Matters Concluded.

5. Where sellers of hay sued for balance on the contract, and the issue whether the hay representing such balance had been delivered was determined against them, they could not, when later sued by the purchasers for failure to deliver such balance of the hay, plead as a separate defense and counterclaim their delivery of such hay; the prior judgment being conclusive upon such issue.

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*Authorities discussing the question of duty to prevent or reduce damages on breach of contract for sale or purchase are collated in a note in 52 **L. R. A.** 259. REPORTER.

Judgment—Waiver of Estoppel of Former Judgment.

6. The estoppel of a former judgment, determining that sellers had not delivered all the hay contracted for, was not waived by the purchasers bringing an action for damages for the failure to deliver the full amount contracted for, since any such waiver must necessarily relate to a question determined in the former action.

Sales—Damages.

7. The measure of damages for the breach of an executory contract for the sale and delivery of personal property is the difference between the contract price and the market value at the time and place of delivery, or within a reasonable length of time thereafter.

Damages—Duty to Reduce.

8. The law imposes upon a party injured by another's breach of contract the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible, and if by his negligence or willfulness he allows the damage to be unnecessarily enhanced, the increased loss, when it was avoidable by the performance of his duty, falls upon him.

Evidence—Market Value.

9. Where the value of personal property is in issue, if the same has a market value at the time and place in question, the evidence is usually confined to its value at such time and place, or at a reasonable time before and after that particular time.

Evidence—Market Value.

10. Where the value of personal property is in issue, if it has no market value at the time in question, the market value at some other time, before or after, may be shown.

Evidence—Value.

11. In action for failure to deliver hay, where no difficulty appeared in proving its market value at or about the time it was contracted to be delivered, evidence of its market value several months thereafter, when market conditions were entirely different, was inadmissible.

Sales—Damages.

12. The rule limiting damages for nondelivery of hay contracted for to the difference between the contract price and the market price at the time and place of delivery would not be affected by the sellers' further failure, under the contract, to furnish a feeding place for the purchasers' stock, necessitating buying hay at or transporting it to another place, since these would be separate elements of damage.

Appeal and Error—Reversal—Remanding Case.

13. Under Section 3, Article VII, of the Constitution, as to disposition of case on appeal, in action for breach of contract, a portion of verdict for plaintiff which was based on evidence admitted under an erroneous theory of measure of damages would, on appeal, be eliminated from the judgment for want of competent evidence to support it, and judgment reversed and cause remanded, with directions to enter judgment for plaintiffs for the balance of the verdict.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is an action to recover damages for the breach of a contract for the sale of hay. Verdict and judgment went for plaintiffs and defendants appeal.

On September 22, 1915, the defendants, H. M. C. Company, and the plaintiffs, Stillwell & Proffitt, entered into an agreement in writing whereby the former agreed to furnish to the latter 400 tons of hay, more or less, delivered in the stack upon its premises known as the H. M. C. Company ranch, located in Union County, Oregon, at the price of $6 per ton on measurement of 480 cubic feet to the ton. It was further contracted that Stillwell & Proffitt should have the privilege of using certain lands described in the contract for the purpose of pasturing livestock during the time they were feeding the hay purchased, for the sum of $350. The hay consisted of 25 certain stacks of hay selected and agreed upon by the parties, 23 of which were located upon the pasture lands mentioned. It is admitted that the 25 stacks contained 548 tons of 480 cubic feet each. About the time of signing the contract Stillwell & Proffitt turned several head of cattle into the pasture lands where they remained during the fall and winter seasons of 1915 and 1916. On October 1st, before the hay had been measured, a fire broke out upon adjoining lands and, without the fault of either of the parties to this action, spread over these lands and destroyed 13 stacks of the hay stacked thereon, amounting to 283 tons according to the measurement of the remaining portion. On October 22d, the 12 remaining stacks were measured by the parties and found to contain 263 tons for which the plaintiffs paid the defendants $6 per ton, aggregating

$1,578, and also paid them $350 for pasture land, refusing to pay for the hay burned. Thereafter, on January 9, 1916, H. M. C. Company brought an action in the Circuit Court of the State of Oregon for Union County against Stillwell & Proffitt, alleging that they had sold and delivered on September 22, 1915, the pasture land mentioned for $350 and 548 tons of hay for $6 per ton, aggregating $3,638, and that they had paid H. M. C. Company $1,928, leaving a balance of $1,710, for which judgment was asked.

Stillwell & Proffitt, as defendants therein, answered the complaint denying the delivery of the hay burned or the delivery of more than 263 tons; alleging that they paid $1,578 for the 263 tons, and $350 for the pasture, aggregating $1,928, and, in effect, denying any liability for the hay burned; and prayed for "judgment against plaintiffs for their costs and disbursements" in the action, "and that they be allowed to go hence without day."

A reply was filed putting the cause at issue and the same was tried to the court and jury resulting in a verdict and judgment in favor of the defendants Stillwell & Proffitt for their costs and disbursements. No appeal was taken from this judgment.

In October, 1916, Stillwell & Proffitt brought this action to recover damages against H. M. C. Company, defendants, for the alleged breach of the contract of September 22, 1915, in failing, neglecting, and refusing to deliver to them 283 tons of the hay mentioned in the contract. To the complaint in this action the defendants, H. M. C. Company, filed their answer putting in issue the allegations thereof, and, among other things, set up as a bar to the prosecution of this action the record and judgment in the former action of *H. M. C. Company* v. *Stillwell & Proffitt.* To the

separate answers the plaintiffs demurred on the grounds that the same did not state facts sufficient to constitute a defense. The demurrer was sustained by the court. The case was tried upon the issues made by the pleadings and resulted in a verdict and judgment in favor of the plaintiffs Stillwell & Proffitt, in the sum of $1,705. Owing to a ton or two of the hay having been used for a miscellaneous purpose there is a slight discrepancy in the figures of the number of tons. REVERSED AND REMANDED WITH DIRECTIONS.

For appellants there was a brief submitted over the names of *Mr. Charles H. Finn* and *Messrs. Crawford & Eakin.*

For respondents there was a brief prepared and submitted by *Mr. Francis S. Ivanhoe.*

MR. JUSTICE BEAN delivered the opinion of the court.

1, 2. The first question for determination is whether the judgment in the former action of *H. M. C. Company* v. *Stillwell & Proffitt,* entered on March 19, 1916, is a bar to the prosecution of this action. From the pleadings in the former action which have been referred to briefly, it is noticed that Stillwell & Proffitt denied the delivery of more than 263 tons of hay and affirmatively alleged that H. M. C. Company failed to deliver the balance of the 283 tons of hay mentioned in the contract. As we view the matter this allegation amounted to no more than an affirmative denial. They did not in the first action plead their damages occasioned by the breach of the contract as a counterclaim or defense. It is a well-settled rule of law that when the second action between the same parties is upon a different claim or demand, or cause of action, the judgment in the first suit operates as an estoppel only as to the

point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. This doctrine holds true whether the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*. In all cases it should appear that the first judgment determined the actual question at issue between the parties, and that the precise question was raised and decided in the former suit. On the other hand it is equally well established that a fact which has been already tried and determined by a court of competent jurisdiction cannot be contested again between the same parties, and that where some controlling fact or question material to the determination of both actions has been determined in a former suit, and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the latter suit: 15 R. C. L., p. 973, § 450; *Barrett* v. *Failing*, 8 Or. 152, 156; *La Follett* v. *Mitchell*, 42 Or. 465 (69 Pac. 916, 95 Am. St. Rep. 780); *Ruckman* v. *Union Ry. Co.*, 45 Or. 578, 581 (78 Pac. 748, 69 L. R. A. 480); *Paulson* v. *Oregon Surety etc. Co.*, 70 Or. 175, 180 (138 Pac. 838); *Cromwell* v. *County of Sac*, 94 U. S. 355, 356 (24 L. Ed. 195).

Section 449 of 15 R. C. L. (p. 972) reads thus in part:

"While a judgment is decisive of the points raised by the pleadings, or which might properly be predicated upon them, it does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiffs might have joined, but which in fact are not joined or embraced in the pleadings."

3. In the former action the defendants Stillwell & Proffitt, could have set up their counterclaim for damages

and had the same adjudicated therein, but they did not do so. They were not compelled to take such course or be precluded from bringing an independent action for the same. They had an election to use such cross-demand as a defense by way of recoupment or to bring a separate action upon it. The omission to take advantage of matter of counterclaim as a defense is no bar to a cross or separate action upon it, so that though the cross-claim be admissible by way of defense the defendant has an option to avail himself of it in that form or to sue upon it in another action. The reason for allowing the defendant such an option is that a different rule would greatly diminish the benefit to which he is entitled and in some cases wholly neutralize it. It may require some time for the development of the injury which will result from plaintiff's misconduct or default. It is unreasonable, therefore, that he should have the right to fix the time at which the money value of his wrongdoing or omission shall be ascertained. That right is given to the party not in default: 1 Sutherland, Damages (3 ed.), § 187, p. 470; Bigelow on Estoppel (6 ed.), p. 202. At page 203 of the last text-book mentioned, it is stated:

"No suit can be maintained except upon a legal ground of action. Now, as one cause of action cannot in itself alone, when merged in judgment, carry another independent cause of action with it, it is difficult to understand how a judgment for the plaintiff without plea can extinguish a counter right of action by the defendant, however closely connected the two claims may be. Everyone has the right to try his own case, and in his own way."

4. Stillwell & Proffitt, as defendants, had the right in the former action to elect as to whether or not they would plead and seek to recover on their counterclaim for damages when sued for the purchase price of the

hay alleged to have been sold and delivered to them, or deny the delivery and bring an independent action for damages resulting from a failure to deliver: 19 Ency. Plead. & Prac., p. 731; 2 Black on Judgments, § 761; *Pruitt* v. *Muldrick,* 39 Or. 353–358 (65 Pac. 20); *Hoover* v. *King,* 43 Or. 281, 287 (72 Pac. 880, 99 Am. St. Rep. 754, 65 L. R. A. 790); *Burnett* v. *Marrs,* 62 Or. 598 (125 Pac. 838); *Krebs Hop Co.* v. *Livesley,* 59 Or. 574, 584 (114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758). The question of the damages suffered by the present plaintiffs was not in issue nor adjudicated in the former action. The claim of plaintiffs in this action is not in any way inconsistent with the findings or questions determined in the former judgment.

Mr. Bigelow says in his work on Estoppel (6 ed.), p. 206:

"A judgment is conclusive only in respect of matters necessarily inconsistent with it. Now, the fact of the ill performance of a contract is not inconsistent with a judgment upon the contract by the other party": See also Id., p. 203, note 4.

5. In the present case defendants, H. M. C. Company, as a separate defense and as a counterclaim to plaintiffs' cause of action, set forth the written contract of September 22, 1915, and also the delivery by them to Stillwell & Proffitt and their acceptance of the entire amount of hay contracted to be sold to plaintiffs, including the 283 tons, and insist that they are entitled to judgment therefor at the contract price. This is the identical matter pleaded by H. M. C. Company in the former action. Issue thereon was raised by the answer of Stillwell & Proffitt and the question of the delivery of the 283 tons of hay was tried and determined as shown by the answer, and that judgment has become final. Applying the rules above referred to,

the former judgment is conclusive and binding upon the parties to that extent.

6. In *Cromwell* v. *County of Sac,* 94 U. S. 355 (24 L. Ed. 195), Mr. Justice FIELD said:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Counsel for defendants contend that plaintiffs waived and set at large the estoppel by the former judgment. There was no waiver by bringing the present action. Any such waiver must of necessity relate to a question determined in the former action, as in *Cooley* v. *Snake River Dist. Imp. Co.,* 78 Or. 384 (152 Pac. 1190).

At the proper time defendants' counsel asked for appropriate instructions to the jury as to the delivery of the hay, based upon their contention as to the former judgment. This part of the charge to the jury need not be further considered. There was no error in sustaining the demurrer to defendants' separate defenses.

The merits of this case depend upon the damages for the breach of the contract for the sale and delivery of the hay. As to this part the plaintiffs allege that in the early fall of 1915 the plaintiffs had and owned a large band of stock cattle, to wit, between 350 and

400 head, and in the course of their business wished to pasture and feed them during the entire fall and winter seasons of 1915 and 1916, including the months of December, 1915, and January, February, March, and April, 1916, at some point in Union County; that they required for so feeding and pasturing the cattle during the period mentioned, several hundred acres of pasture, suitable for feeding grounds, and from four hundred to six hundred tons of hay; that on account of the failure of the defendants to deliver the remainder of the hay agreed to be furnished, plaintiffs were compelled to and did go into the open market of Union County, Oregon, and purchase 253 tons of hay of like kind, and paid therefor the aggregate sum of $3,312.50, the market value thereof, by reason of which they were damaged in the sum of $1,602.50. They also allege loss by reason of having to remove the cattle to other feeding grounds in the middle of winter and the shrinkage and loss thereof. Mr. Stillwell, one of the plaintiffs'' testified in regard to replacing the hay that:

"Well, when I saw we wasn't going to have hay to run the cattle through I started to rustle around to get some more hay."

He said that he presumed it was in January when he discovered that fact; that the first hay which he purchased for $12.50 a ton to replace that burned was measured January 19, 1916, and arranged for a day or two before that; that about the first of October he knew the hay was burned; that he went to Kansas City to market some cattle and returned in about two weeks; that he may have said in effect that he would not buy any more hay; that if the winter was as mild as the preceding one the 263 tons would be sufficient to carry them through; that about February 6th follow-

ing, he purchased hay from Mr. Krouse at $12.50 a ton; that hay was cheaper up to that time; that he purchased hay of Mr. Reynolds at $16 per ton; that at that time he could not have bought any other hay of any consequence any cheaper with which to feed his cattle. Indeed, we find an offer of counsel for plaintiffs to prove

"that if the winter of 1915–1916 had been a winter of the same character (as the preceding one) the 263 tons of hay actually delivered, would have been sufficient to have carried his cattle during that time."

It is shown on the part of the defendants that the market price of hay, similar to that contracted to be delivered, the last part of September and during October of that year was from $5.50 to $6.

7, 8. Upon the question of damages, errors numbered 3 to 5, 9 to 14, and 15 to 19 are assigned. The first class of these assignments involves the admission of evidence over the objections and exceptions of defendants' counsel as to what plaintiffs paid for hay in January, February, and March, 1916, to replace the 283 tons of hay destroyed by the fire of October 1, 1915, and therefore not delivered. The other assignments of error embrace the action of the court in refusing to give certain instructions requested by defendants and to the giving of certain charges to the jury upon the measure of damages. All these assignments may be considered together.

The measure of damages for the breach of an executory contract for the sale and delivery of personal property is the difference between the contract price and the market value at the time and place of delivery or within a reasonable length of time thereafter: 8 R. C. L., p. 487, § 48; *Hockersmith* v. *Hanley,* 29 Or. 27, 36 (44 Pac. 497); *Krebs Hop Co.* v. *Livesley,* 59

Or. 574 (114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758); *Russell Miller Milling Co.* v. *Bastasch,* 70 Or. 475 (142 Pac. 355). At page 479 (of 70 Or.) of the opinion in the last-named case, Mr. Justice BURNETT tersely stated the rule thus:

"It is a plain question of a breach of an executory contract for the sale of personal property at a price specified. The measure of damages for a breach of such a contract by the purchaser is the difference between the contract price and the lesser market value of the goods at the time of the breach of the contract."

The law imposes upon a party injured by another's breach of contract the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damage to be unnecessarily enhanced, the increased loss when it was avoidable by the performance of his duty falls upon him: *Sherman Center Town Co.* v. *Leonard,* 46 Kan. 354 (26 Pac. 717, 26 Am. St. Rep. 101, 104); 8 R. C. L., § 14, p. 442.

9–11. Plaintiff's counsel stated their position on this question in their brief as follows:

"We submit that it is immaterial when respondents purchased hay to replace the hay burned, if they paid no more than the market price or what it could have been purchased for with suitable feeding grounds, within a reasonable time after they learned appellants would not replace it."

Where the value of personal property is in issue, if the same has a market value at the time and place in question, then the evidence is usually confined to its value at such time and place, or at a reasonable time before and after that particular time: *Comer* v. *Way,* 107 Ala. 300 (19 South. 966, 54 Am. St. Rep. 93); *Jones* v. *Morgan,* 90 N. Y. 4 (43 Am. Rep. 131). If

there is no market value at the time, then the market value at some other time, before or after, may be shown: 8 R. C. L., p. 647, § 190. The admission of evidence as to the value of personal property before or after the time of its loss, or when it should be delivered under the contract is for the purpose of proving the value at the time in question for the want of any better evidence; but this does not permit a party to prove the value of personal property, contracted to be delivered at a certain time, at a later date when the market value has doubled or trebled. There does not appear to have been any difficulty in proving the market value of the hay at or about the time it was contracted to be delivered, or between September 22, 1915, and December 1, 1916. We see no reason for resorting to proof of the price paid nearly three months after the breach of the contract when the market conditions were entirely different. There were no special circumstances to warrant the exercise of a discretion: *Beach* v. *Raritan etc. R. Co.*, 37 N. Y. 457, 470. By some appropriate instruction the jury should have been limited to the market value of the hay at the place and about the time of the contemplated delivery.

The evidence of plaintiffs as to the price paid for the hay in January, February, and March, 1916, was incompetent for the purpose of showing the market value of the hay at the time the same was to have been delivered under the terms of the contract. On October 1, 1915, the plaintiffs had knowledge that the hay was burned and that they could not rely upon the same for the purpose of wintering their cattle. They state in their complaint that early in the fall of 1915 they had between 350 and 400 head of cattle which

they wished to feed during the fall and coming winter and required

"several hundred acres of pasture, suitable for feeding grounds during the winter season of said years, and from 400 to 600 tons of hay."

Knowing this, it was not in compliance with their duty or the exercise of ordinary care for them to speculate upon the mildness or rigor of the coming season, and wait until the latter part of January, 1916, before purchasing a portion of the hay and until February and March before obtaining the remainder to be substituted for that destroyed. If Stillwell & Proffit desired to take chances upon the 263 tons of hay delivered being sufficient for the sustenance of their cattle during the following winter they could do so at their peril.

12, 13. Defendants' counsel requested several instructions to the purport that the court charge the jury, in addition to the rule of damages as above stated, so as to restrict the evidence of the market value of the hay to the period for delivery or within a reasonable time thereafter. The court charged the jury, in substance as requested, with the following qualification that it was the duty of the plaintiffs upon learning that the hay was burned and there was found to be only 263 tons thereof "to have immediately and within a reasonable time * * purchased the same in the market, *if they could purchase such hay with a suitable place to feed the same to plaintiffs' stock.*" Defendants' counsel objected and excepted to the modification in the words which we have italicized. In order to counteract the effect of the evidence admitted as to the price paid for hay in January, February, and March, 1916, or to "unring the bell," we think the instruction should have been given without the modifi-

cation. The matter of obtaining a suitable feeding ground whereon to feed the hay was the excuse claimed by the plaintiffs for not purchasing it at an earlier date. Its purchase at a later date would not remedy the inconvenience as to the feeding grounds. The matter of the transportation of the hay, or the place where the cattle were necessarily fed, or their removal to some other suitable place, would under certain circumstances be an element of damages; but we fail to see how it could change the law relating to the measure of damages, as to the time at which the market value of the hay should be established. It is not shown that plaintiffs could not have bought at an earlier date and from the same parties for the then market price, the identical hay which they afterwards purchased. Nor is it shown that they could not have purchased the hay required in the immediate vicinity during the fall of 1915 at the price mentioned in the contract and thereby have reduced the damages to a minimum. On the other hand, the evidence, all of which is contained in the record, shows that by a reasonable effort the hay could have been obtained by plaintiffs before December 1st of that year at the market price of $6 per ton. The expense of moving the cattle and the loss by shrinkage caused thereby were put in evidence and submitted to the jury. By a special verdict $1 was fixed as such loss by shrinkage. The $1,602.50 recovered for the difference between the price paid by plaintiffs for the 253 tons of hay purchased from different parties and the contract price should be eliminated from the judgment for want of any competent evidence to support the same. The balance of $107.50, special damages, should be allowed plaintiffs as compensation for moving their cattle and loss occasioned thereby: Article VII, Section 3, Const. of

Oregon; *Murphy* v. *Panter,* 62 Or. 522 (125 Pac. 292); *Hoag* v. *Wash.-Oregon Corp.,* 75 Or. 588 (144 Pac. 574, 147 Pac. 756).

The judgment of the lower court is reversed and the cause will be remanded with directions to enter judgment in favor of the plaintiffs in the sum of $107.50.

REVERSED AND REMANDED WITH DIRECTIONS.

REHEARING DENIED.

MR. JUSTICE BURNETT dissents.

On petitions of appellants and respondents for rehearing. Both petitions are denied and former opinion sustained. Rehearing denied.

Mr. Charles H. Finn and *Messrs. Crawford & Eakin,* for defendants-appellants.

Mr. Francis S. Ivanhoe, for plaintiffs-respondents.

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

In our former memorandum of opinion we indicated that the judgment of the lower court should be set aside on account of prejudicial error and judgment was directed entered under Article VII, Section 3, of the Constitution, which provides that either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury and any other matters material to the decision of the appeal; and

"if the Supreme Court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed

during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court."

Counsel for defendants petitioned for a rehearing and called attention to that part of the former opinion wherein it was stated that the $1,602.50 recovered for the difference in the price paid by plaintiffs for the 253 tons of hay purchased and the contract price should be eliminated from the judgment for want of any competent evidence to support the same; that the balance of $107.50, special damages, should be allowed plaintiffs as compensation for moving their cattle and loss occasioned thereby. This balance should be $102.50. In making the memorandum the sum of $1,710.00, which appeared in the record, was evidently remembered as the amount of the judgment instead of $1,705.00, the correct amount. This correction can be made by the clerk. We are impelled to do this upon the retrial of the issue in order that our findings upon this important question of damages for moving a band of about 400 head of cattle three different times during the inclement winter season shall coincide with the findings of the jury in that respect. It is strenuously urged by counsel for defendants that the evidence shows that the expense of moving the cattle the first time is not "greater than three or four dollars, the cost of the two thirty-dollar per month men for one day." We are unable to accede to this contentious argument. It is doubtful if the amount named by defendants' counsel would pay the expenses of one while superintending such removal. It appears from the evidence that the cattle were not all moved at one time,

and that all the circumstances, trouble and expense of so moving the cattle were detailed, although not with every item of expense. Mr. Stillwell, one of the plaintiffs who appears to be a reasonable and conscientious witness, stated in part in regard to the cost of moving the cattle:

"Well, there was extra men and when I got over on the Dobbin place, I had to put on an extra man and team there. I could not tell you just off-hand in dollars and cents how much the extra expense was. It was quite a considerable sum."

That the expense and injury occasioned by moving the cattle amounts to less than $105.50 cannot be believed by anyone familiar with such matters as the jury probably was. It is asserted that this sum is not within the issues raised by the complaint; that part of the complaint reads as follows:

"That by reason of defendants failing, neglecting and refusing to furnish plaintiffs' said hay at the time and place and as they contracted and agreed to do, plaintiffs were compelled to and did, at great cost and expense move said cattle from the feed grounds and pasture lands purchased from defendants as aforesaid, and in the sum of not less than $100; and that by reason of said failure, neglect and refusal of defendants, and the said removal of said cattle from said pasture and feeding grounds, plaintiffs lost in injury to, death and shrinkage that was and could never be returned, in the sum of not less than fifteen hundred dollars."

It is obvious that a much larger amount than that allowed by the jury and by this court was alleged in the complaint. It is evident that the jury allowed a small sum for injury to the cattle other than the one dollar shrinkage, as shown by the special verdict. All the evidence on this phase of the case was carefully weighed by this court and no doubt was so considered

by the jury. Defendants' petition for a rehearing is denied.

Plaintiffs filed a petition for rehearing and while no real complaint is made to the re-examination of the facts under the Constitution it is earnestly argued that the evidence in the case showed the market value of the hay which was not delivered to be, at or about the time of the failure to deliver the same, the amount paid by the plaintiffs in January, February and March; and that the court erred in holding that there was failure to prove what the market value of the hay was on or about October 22, 1915, when the remainder was measured, and was not shown to be more than six dollars per ton; but that, on the other hand, it was shown to be no more than that sum. In its entirety Mr. Stilwell's evidence indicates that there was no effort made to purchase hay until long after the date mentioned when the winter season proved to be more severe than he had expected. While he testified that he commenced to look around for hay with suitable feeding grounds he practically admitted that he said in effect that if the winter was not more severe than the prior one the hay which was not burned would be sufficient for wintering his cattle. His statement quoted in our opinion as follows: "Well, when I saw we wasn't going to have hay to run the cattle through I started to rustle around to get some more"; and that about January 12, 1916, he purchased the first lot for $12.50, stating in this connection "no, I found no cheaper hay than twelve dollars and a half," evidently meant that he could not obtain the hay at that time at any less price, and clearly indicates that no effort was made before that time actually to obtain the hay even though he might have inquired in regard thereto. All the evidence indicates that the plaintiffs failed to exercise due diligence to

obtain the hay required by them, within a reasonable time after the alleged failure to deliver. As suggested in our former opinion when the defendants failed to deliver the hay contracted for, and the circumstances in regard thereto were fully made known to plaintiffs on October 22, 1915, and it was understood between the parties that the hay was agreed to be sold for the purpose of feeding plaintiffs' cattle, the plaintiffs were at liberty to do one of two things: go into the market and purchase hay within a reasonable time thereafter, transport the same to the place where the hay was to be delivered, and charge for such transportation as a part of the damages; or to so purchase the hay and move their livestock to the place where it was purchased and where the cattle could be fed. They followed the latter method except as to the time within which such purchase was made.

Counsel for plaintiffs inquire if the court overlooked the fact testified to by Stilwell that the defendants refused to permit plaintiffs to use the feeding grounds named in the agreement for feeding the unburned hay, and contend that this was sufficient excuse for plaintiffs not purchasing the hay or moving the same to the grounds leased from the defendants. This necessitates a reference to the written contract between the parties from which it appears that the plaintiffs obtained from the defendants

"the privilege of using for the purpose of pasturing their livestock that portion of the lands controlled by party of the first part, H. M. C. Company, located on the west side of Catherine Creek adjoining the H. M. C. Company ranch proper, for the sum of $350."

In our judgment this part of the contract is separate from the agreement as to the sale of the hay. As to the privilege of pasturage or lease, it is neces-

sary to refer to the latter contract for the purchase of the hay, only to ascertain the time for such pasturage. A fair construction of the written contracts shows that the plaintiffs were entitled to the pasturage and feeding grounds for the cattle during the time it would naturally take for feeding the twenty-five stacks of hay contemplated to be purchased. They were in possession of and had written authority to use the premises for the purpose of feeding their cattle for such length of time and it was unnecessary for them to obtain further permission. If before the lease expired the defendants had compelled plaintiffs to abandon the pasture and feeding grounds it would have raised an issue which is not in this case. We have given all the evidence and record our most careful attention and adhere to our former opinion. The petition of plaintiffs is therefore denied. REHEARING DENIED.

MR. JUSTICE BURNETT dissents.

Argued December 14, modified December 27, 1917, action of clerk allowing cost bill affirmed January 15, 1918.

SCHOOL DISTRICT No. 30 *v.* ALAMEDA CONSTRUCTION CO.*

(169 Pac. 507, 788.)

Schools and School Districts—Liability on Contractor's Bonds.

1. Under Section 6266, L. O. L., as amended by Laws of 1913, page 59, providing that any person contracting with a school district, etc., for the construction of any buildings, etc., shall be required to execute the usual penal bond with the additional obligations that the

*On right of subcontractor, materialman or laborer to maintain action on contractor's bond to owner, see notes in 27 **L. R. A. (N. S.)** 573; **L. R. A.** 1915A, 768.

On applicability to public bodies of statute requiring building contractor's bond for protection of subcontractor, laborers, etc., see note in 50 **L. R. A. (N. S.)** 469. REPORTER.

contractor shall promptly make payments to all persons supplying labor or materials to the contractor for use in the prosecution of the work, the statute must be read as part of an undertaking made to fulfill the requirements of the law, and the effect of the undertaking is an express agreement by the surety to pay materialmen whose claims are not liquidated by the contractor.

Schools and School Districts—Action on Contractor's Bond—Sham Denials.

2. In a suit on the bond of one contracting with a school district for the construction of a schoolhouse, where the surety's answer admitted the execution of the bond, but denied that it agreed to pay anyone except the school district, such denial was sham in effect, and left uncontroverted the allegation of the complaint that the surety obligated itself by such bond to pay persons furnishing labor or material in case the contractor failed to do so, in view of Section 6266, L. O. L., as amended by Laws of 1913, page 59, providing that the surety shall be liable to all persons supplying labor or materials.

[As to what are sham pleadings and the remedies against them, see note in 113 **Am. St. Rep.** 639.]

Schools and School Districts—Liability on Contractor's Bonds.

3. Under Section 6266, L. O. L., as amended by Laws of 1913, page 59, the bond given by one contracting with a school district for the construction of a school building has a double obligatory aspect, and the surety's liability thereunder to laborers or materialmen is not affected by changes in the contract after its execution and delivery not attributable to such laborers or materialmen.

Schools and School Districts—Contracts—Actions on Bonds—Variance.

4. Where, in an action on the bond of one contracting with a school district for the construction of a schoolhouse, the surety in its answer admitted that the contract was entered into and the bond given, and alleged that alterations were made after the execution of the contract without its knowledge, increasing its obligation, evidence was not admissible of such changes before the execution of the contract, but after it had signed the bond.

Judgment—Necessity of Findings.

5. Under Section 570, L. O. L., providing that the only pleadings in a matter of disputed costs are the statement of the prevailing party and the objection of the opposite litigant, that the issue shall be heard by the court without a jury, and that as soon as convenient the court or judge shall make and file a correct itemized statement of the costs and disbursements as allowed and render judgment accordingly, and that no other finding or conclusion of law or fact shall be necessary, where the court made no statement of the amount of costs and disbursements properly taxable, but merely ordered that the cost bill filed by plaintiff be allowed and directed the clerk to tax the amounts thereof as plaintiff's costs, the judgment taxing costs, being without any findings to support it, was void.

Appeal and Error—Record—Bill of Exceptions—Necessity.

6. Where a judgment taxing costs was without findings to support it, the error was apparent on the face of the record and reviewable

without a bill of exceptions under Section 172, L. O. L., providing that no exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court.

ON MOTION TO RETAX COSTS.

Costs—On Appeal—Reversal as to Costs.

7. Although the judgment for costs was reversed, appellant was not entitled to costs in the Supreme Court, where the principal judgment was affirmed; the procedure for taxation of costs provided by Sections 569, 570, and 581, L. O. L., although ancillary to the principal matter in dispute, being in practice entirely separate from the latter.

From Clatsop: JAMES A. EAKIN, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

School District No. 30 contracted with the Alameda Construction Company for the erection of a school building. In connection therewith the Construction Company, with the Illinois Surety Company as surety, filed with the officers of the district a bond containing this recital:

"Whereas, the said principal, the Alameda Construction Company, a corporation, entered into a written contract with the said obligee (School District No. 30), dated June 10, 1915, for the construction and completion of a schoolhouse at Warrenton, Clatsop County, Oregon, in accordance with the terms, covenants and conditions of said contract which is hereby expressly referred to and made a part hereof;

"Now, therefore, the conditions of this obligation are such that, if the said principal shall faithfully perform each and every condition and covenant of said contract according to the terms, conditions and covenants thereof, and shall promptly make payments to all persons supplying it, said principal, or any subcontractor working under said principal, with labor or materials for any prosecution of the work provided for in said contract, then this obligation shall be null and void; otherwise, to remain in full force and effect."

This action is brought on the relation of the Hammond Lumber Company, which avers that it furnished to the contractor lumber of the reasonable value of $1,097.08 used by the latter in the construction of the building and for which the relator has not received any compensation. The case hinges upon the fifth allegation in the complaint which is as follows:

"That heretofore, and on the 10th day of June, 1915, pursuant to due and legal proceedings theretofore had and done by the plaintiff School District No. 30 of Clatsop County, Oregon, the said School District No. 30, entered into a written contract with said defendant Alameda Construction Co., wherein and whereby the said defendant Alameda Construction Company covenanted, contracted and agreed to furnish all of the labor and all of the material and construct and erect and complete for the said School District No. 30 of Clatsop County, Oregon, a schoolhouse in said School District No. 30, in accordance with the plans and specifications and detailed drawings then and there prepared and mutually agreed upon between them, and thereby agreed to complete said building in accordance with the plans and specifications and detailed drawings by the 10th day of October, 1915.

"That in order to insure the performance of said contract by the said Alameda Construction Co., and to secure the payment by said Alameda Construction Co. to all persons supplying such contractor labor or material for the prosecution of said work, and as a part of said contract, the said defendant Alameda Construction Co. and the said defendant Illinois Surety Company executed and delivered unto said School District No. 30 their certain bond obligatory in writing in the penal sum of $11,400, wherein and whereby the said defendant Illinois Surety Company covenanted, contracted and agreed that the said Alameda Construction Company would faithfully perform each and every condition and covenant of said contract according to the terms and conditions thereof, and would promptly make payments to all persons supplying it,

the said Alameda Construction Company, or any subcontractor working under said Alameda Construction Company, labor or material for the prosecution of said work provided in said contract, and in case said Alameda Construction Co. failed so to do, then said defendant Illinois Surety Co. therein obligated itself to make such payments not exceeding said sum of $11,400.00.

"That said bond obligatory was duly executed and witnessed, accordingly as provided by law, and accepted by said School District No. 30, and the same formed a part of said contract."

The answer denies another averment about furnishing the material, but its statement concerning the fifth allegation of the complaint above set forth is as follows:

"Admits the allegations contained in Paragraph V of plaintiffs' complaint, save and except that this defendant denies that it obligated itself under and by the terms of said bond that it would make payments to all or any persons supplying said Alameda Construction Company, or any subcontractor working under said Alameda Construction Company, for labor or material for the prosecution of said work provided in said contract, or agreed to make payments to any person save and except the obligee in said bond."

Further answering, the Surety Company declared in substance that after the agreement for the erection of the building was entered into between the district and the Construction Company and after the bond mentioned had been executed and delivered, the district without the knowledge or consent of the Surety Company made material changes in the contract which are specifically stated.

In an additional answer the Surety Company contends that it should be relieved from liability on the bond because in violation of the agreement in that re-

spect the School District made various payments to the contractor without requiring the presentation and filing receipts for labor and materials theretofore furnished for the building.

The reply traverses the new matter in the answer. A jury trial resulted in a judgment for the relator and the Surety Company appeals. Modified.

For appellants there was a brief and an oral argument by *Mr. John H. Hall.*

For respondent there was a brief over the name of *Messrs. G. C. & A. C. Fulton,* with an oral argument by *Mr. George C. Fulton.*

Mr. Justice Burnett delivered the opinion of the court.

The bond in question was given under the provisions of Chapter 27 of the Laws of 1913, p. 59, amending Section 6266, L. O. L., so as to read as follows in part:

"Hereafter any person or persons, firm or corporation, entering into a formal contract with the State of Oregon, or any municipality, county, or school district within said state, for the construction of any buildings, or the prosecution and completion of any work, or for repairs upon any building or work, shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts."

1, 2. The same section provides that any person supplying labor or materials shall have a right of action and shall be authorized to bring suit in the name of the State of Oregon or any county, municipality or school

district within such state for his use and benefit against the contractor and his sureties and to prosecute the same to final judgment and execution. By these excerpts from the pleadings we are taught that the execution of the bond and contract as stated in the fifth allegation of the complaint are admitted. It is true the answer denies that the Surety Company agreed to pay anyone except the School District, but the statute above named must be read as part of the undertaking because the latter instrument was made to fulfill the requirements of that law. By the execution of the bond and its delivery, the Surety Company created a situation in which it would be compelled to pay materialmen for material furnished and not paid for by the contractor. In other words, the effect of this contract is an express agreement of the Surety Company to pay such claims not liquidated by the contractor and not only so, but to make payments directly to the materialmen. In this view of the case, the denial mentioned is sham in effect, so that averment No. V of the complaint stands uncontroverted, leaving the only contest to be waged over the matter of furnishing the material. It is true that the corporate character of the relator was denied on information and belief, but no notice seems to have been taken of that in the trial and no error is predicated concerning it.

3. The bond has a double obligatory aspect. As to the School District, it is the usual penal undertaking ordinarily required between owners and builders; but it operates equally in favor of those who furnish labor or materials, for the statute imposes upon the surety "the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any

prosecution of the work provided for under such contracts."

This latter stipulation of the bond, therefore, is for the benefit of the materialman or laborer and is not affected by breaches of other terms of the contract, committed by other parties. As stated in the syllabus to *Kansas City ex rel.* v. *Schroeder,* 196 Mo. 281 (93 S. W. 405):

"The contract between the materialmen and the contractor is independent of the contract between the city and the contractor; therefore, the relief to which the materialmen are entitled does not depend upon the validity of the contract between the city and the contractor."

Unless, therefore, the relator was a party to the breach of the main contract between the School District and the contractor its rights cannot be prejudiced by any act of either of the other stipulating parties. There is no charge of the kind against the relator. By the terms of the enactment it is entitled to bring an action on the undertaking for its own benefit and to pursue the same even to judgment and execution independent of the School District except the mere use of its name. It is stated in *United States* v. *National Surety Co.,* 92 Fed. 549 (34 C. C. A. 526), that:

"The two agreements which the bond contains, the one for the benefit of the government and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience. In view of these considerations, we are of the opinion that the sureties in a bond, executed under the act now in question, cannot claim exemption from liability to persons who have supplied labor or material to their principal to enable him to execute his contract with the United States, simply because the government and the

contractor, without the surety's knowledge, had made some changes in the contract, subsequent to the execution of the bond given to secure its performance which do not alter the general character of the work contemplated by the contract or the general character of the materials which are necessary for its execution When the government has executed the contract and taken and approved the bond, it ceases to be the agent of third parties whom the contractor employs in the execution of the work or from whom he obtains materials and the rights of such persons under the bond are unaffected by subsequent transactions between the government and the contractor'': *Griffith* v. *Rundle,* 23 Wash. 453 (63 Pac. 199, 55 L. R. A. 381); *Conn* v. *State,* 125 Ind. 514 (25 N. E. 443).

All the allegations of the answer, therefore, respecting a change in the contract after its execution and delivery and of other violations not attributed to the relator may well be disregarded as affecting the right of the plaintiff to recover in this action. Indeed, passing the denial on information and belief of the corporate existence of the relator, all that was incumbent upon it in the trial of the case was to prove its allegation about furnishing material and the failure of the contractor to pay for the same.

4. The Surety Company offered to show at the trial substantially this state of facts: The architect who had prepared the plans and specifications for the building and who was acting as the agent of the School District prepared a form of contract in Portland which was signed by the contractor in triplicate and by it taken to the Surety Company to whom it applied for the bond. The company executed the bond and gave it to the contractor to be delivered to the School District. The officers of the contractor then went to Warrenton with the bond and the contract in triplicate signed by

itself and tendered the papers to the School District. The officers of the district then made some material changes in the contract increasing the obligation of the contractor without the knowledge of the Surety Company and signed the contract thus altered and retained the bond. The Circuit Court denied the Surety Company the right to show this state of facts under the pleadings as framed. This ruling was correct for the reason that the allegation was to the effect that the alterations were made after the execution of the contract, whereas the offer of proof was to show a change before the contract was executed. The allegations and the proof did not correspond. If the Surety Company intended to rely upon this state of facts it should have denied the execution of the bond and contract and then would have been fulfilled its statement in the brief that

"our contention is that there was no valid subsisting contract of insurance ever entered into between the Illinois Surety Company and School District No. 30, or any materialmen or laborers; that in fact, no contract of insurance was ever entered into at all on the part of the Illinois Surety Company."

Moreover, the new matter in the answer is controlled by the admission of the truth of paragraph V of the complaint. It being conceded in all the pleadings that a contract was entered into and that the bond was given, thenceforward a separate obligation arises in favor of the materialman and against the Surety Company which cannot be prejudiced by any of the matters averred in the answer. The judgment of the Circuit Court on the merits was right and is therefore affirmed.

5, 6. After judgment plaintiff filed his cost bill wherein he claimed for sundry witnesses and for a re-

porter's fee. The answering defendant filed objections to certain items, among others, against the amount claimed for two witnesses who were not called and did not testify in the case. Afterwards, without making any statement of the amount of costs and disbursements properly taxable in favor of the plaintiff, the court ordered

"that the plaintiff's cost bill filed herein be and the same is in all respects allowed, and the clerk of this court is hereby directed to tax the amount hereof as the costs of plaintiff in this action."

In its notice of appeal the Surety Company used this language:

"And appeal from the judgment of said court in taxing and allowing J. E. Tourtellotte $25.00 as witness fees and mileage, and Clara Munson $3.20 as witness fees in said cause."

On this branch of the case, which is a separate proceeding, as stated by Mr. Justice RAMSEY in *Perkins* v. *Perkins*, 72 Or. 302 (143 Pac. 995), the only matters on file and of record are the bill of costs and disbursements, the objection thereto and the judgment of the court. It is laid down by Section 570, L. O. L., that the only pleadings in a matter of disputed costs and disbursements are the statement of the prevailing party and the objection of the opposite litigant; that all issues involved by the statement and objections shall be heard by the court without a jury; that at such a hearing either party may produce any testimony either oral, by deposition or otherwise, to sustain the issues on his behalf; and that a bill of exceptions may be framed as in other actions. It is further required by this section that:

"As soon as convenient after the hearing, the court or judge thereof shall make and file with the clerk of

the court a correct itemized statement of the costs and disbursements as allowed by the court or judge, and shall render judgment thereon accordingly for the party in whose favor the same are allowed; and no other finding or conclusion of law or fact shall be necessary, and the same shall be final and conclusive as to all questions of fact."

It further provides for a separate appeal wherein the statement of disbursements, the objections, the statement of costs and judgment filed by the court or judge, the judgment or decree rendered therein, and the bill of exceptions, if any, shall constitute the judgment-roll. There is presented, therefore, for our consideration an appeal wherein the record consists of only the pleadings and the judgment without any findings to support it. Such a judgment is void under the authority of *Moody* v. *Richards,* 29 Or. 282 (45 Pac. 777), and *Clackamas Southern R. Co.* v. *Vick,* 72 Or. 580 (144 Pac. 84). The error is apparent on the face of the record itself so that no bill of exceptions is required: Section 172, L. O. L. The judgment of the Circuit Court upon the matter of costs and disbursements is reversed and remanded for further proceedings not inconsistent herewith.

MODIFIED. COSTS RETAXED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Action of clerk in allowing costs approved January 15, 1918.

ON OBJECTION TO COST BILL.

(169 Pac. 788.)

On objection to cost bill as allowed by clerk of this court. Affirmed.

Mr. John H. Hall, for the objectors.

Mr. George C. Fulton and *Mr. A. C. Fulton, contra.*

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

7. The relator recovered a judgment in the Circuit Court. In due time after the rendition thereof it filed its cost bill. The defendant surety company objected to certain items thereof and being dissatisfied with the decision of the Circuit Court on that matter as well as with the result of the trial on the main issues found in the original pleadings it appealed not only from the latter decision but also from the one rendered by the court on the objections to the cost bill. The hearing in this court resulted in an affirmance of the principal judgment with costs and disbursements in favor of the relator and a reversal of the judgment of the Circuit Court in the matter of costs with directions to remand the ancillary issue for further proceedings. At this juncture the relator filed in this court a cost bill which was allowed in full by the clerk. The surety company also tendered for filing here a cost bill on its behalf which the clerk refused to file or allow. Consequent upon this the surety company has served upon the relator and now files a paper purporting to be a notice not only to the clerk but to the attorneys for the rela-

tor to the effect that the Surety Company appeals to the justices of the Supreme Court from the decision of the clerk "disallowing appellants' bill of costs and disbursements, and declining to file the same, and from the order of the said clerk filing and allowing respondents' bill of costs and disbursements, and from the whole thereof." This paper will be treated as an objection to the relator's cost bill notwithstanding it has not been verified as required by Section 569, L. O. L.

The defendant contends that inasmuch as our former decision reversed the ruling of the Circuit Court on the matter of costs and disbursements it constituted such a modification of the whole decision below as to carry costs for the defendant in this court. In support of this contention the following precedents are cited: *La Vie* v. *Crosby,* 43 Or. 612 (74 Pac. 220); *Anderson* v. *Adams,* 43 Or. 621 (74 Pac. 215); *Gardner* v. *Kinney,* 60 Or. 292 (117 Pac. 971). All these cases were instances where the principal judgment itself was modified to the advantage of the appellant. In *Anderson* v. *Adams,* although it was an action at law, the principal judgment was modified without allowing costs. Section 569, L. O. L., provides for the taxation of costs and disbursements. Nothing can be allowed in that behalf unless a verified statement of the prevailing party with proof of service thereof, if notice to the adverse litigant is required, shall be filed with the clerk. Under certain circumstances it may be filed as late as the first day of the next term. Such statement shall be allowed of course by the clerk unless the adverse party files objections thereto, stating particulars. The statement and the objections constitute the only pleadings required on the settlement of costs and disbursements. The issues on that subject having been thus made up, Section 570, L. O. L., has provided

the manner of their determination. The hearing is by the court or judge without a jury and provision is made for excepting to the rulings and for the formation of a bill of exceptions. It is required that the court embody its decision in the shape of "a correct itemized statement of the costs and disbursements as allowed," and judgment is rendered thereon for the party in whose favor the same are allowed. That section also contains the following clause:

"The issues arising on the statement of disbursements, and the objections thereto, shall be heard and determined by the court or judge without either party recovering further costs or disbursements from the other, except that in the discretion of the court, or judge thereof, a sum not exceeding $5 as costs, but without further disbursements may be allowed to the party prevailing on the issues arising on the statement and objections thereto."

The remainder of the section provides for an appeal in which the cost bill, the objections, the correct itemized statement made by the court, judgment thereon, and the bill of exceptions, if any, shall constitute the judgment-roll.

The procedure governing the settlement of costs and disbursements, although ancillary to the principal matter in dispute is, in practice, entirely separate from the latter and is *sui generis*. It is provided in Section 550, L. O. L., as amended by the act of February 28, 1913, Laws 1913, p. 617, that the aggrieved party may appeal orally at the time the judgment is rendered or by serving a written notice within sixty days thereafter if the appeal is from a determination of the Circuit Court, or, in other cases, within thirty days after the rendition of the judgment. We have seen that the party there prevailing is permitted to file his cost bill, at any rate, within five days after the judgment and

under certain circumstances by the first day of the next term, and that the opposite party may file his objections within five days thereafter. There is possible delay in hearing and determining the issues thus formed so that in many cases the sixty-day period allowed for appealing from the main judgment might elapse before such subsidiary matters were settled. All this indicates that the Code must be construed as making the two proceedings separate where the controversy is about the amount to be allowed as costs and disbursements. This principle is recognized in *Lemmons* v. *Huber,* 45 Or. 282 (77 Pac. 836), *Wadhams* v. *Allen,* 45 Or. 485 (78 Pac. 362), *Perkins* v. *Perkins,* 72 Or. 302 (143 Pac. 995), and *Morris* v. *Leach,* 82 Or. 509 (162 Pac. 253). We are bound, therefore, to consider the questions here involved as distinct from the principal judgment. It is not affected in any way by the present dispute.

The only provision for costs and disbursements in a procedure of this kind is that in Section 570, allowing $5 to the prevailing party in the discretion of the court. We find also in Section 581 the following:

"In any action, suit, or proceeding as to which the allowance and recovery of costs may not be provided for in this chapter or elsewhere in this Code, costs may be allowed or not, according to the measure herein prescribed and apportioned among the parties, in the discretion of the court."

Here, then, is a separate proceeding, the recovery of costs in which are discretionary to the extent of $5. It is not one which "is not provided for in this chapter." At best it would not be exercising sound discretion to cast the relator in costs when his judgment on the main issue was declared to be sound and a trifling error was discovered in the ancillary litigation.

In no event would it be proper to allow costs and disbursements in favor of the defendant on the main appeal. Even the prevailing party in the separate litigation about costs is not necessarily entitled to additional costs therein. Much less will he obtain them in the main dispute where his adversary secures a complete affirmance of his judgment. The action of the clerk in allowing the relator's cost bill and in refusing to file or allow the cost bill of the defendant will therefore be affirmed and a correct itemized statement of the costs and disbursements of the relator identical in amounts with the original will be filed as required by Section 570, L. O. L.

MODIFIED. COSTS RETAXED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued December 19, 1917, affirmed January 15, 1918.

CROWE *v.* ALBEE, MAYOR.

(169 Pac. 785.)

Evidence—Judicial Notice—City Charters.

1. Under Laws of 1917, page 514, courts are required to take judicial notice of a city charter after a duly certified copy thereof has been filed with the librarian of the Supreme Court.

Municipal Corporations—Discharge of Officers—Review.

2. Under Portland City Charter 1914, Chapter 4, Section 62, providing for suspending of city officers by the mayor, and Sections 98, 100, 101, 108, and 114, establishing a civil service board before whom an officer removed may demand a hearing, and giving the board power to subpoena and compel the attendance of witnesses, etc., and to reinstate officers or affirm dismissal, the board when so acting is a *quasi*-judicial tribunal, whose judgment and discretion will not be interfered with by the courts, but whose acts will be reviewed to see if they conform to the provisions of the statutes conferring such power.

Municipal Corporations—Officers—Civil Service Board—Hearing on Discharge.

3. The civil service board, upon hearing an appeal from officer dismissed, is confined to determination of the questions of the dismissal being for political or religious reasons, or whether in good faith for the improvement of the service, and the officer must sustain the burden of proof, under Portland City Charter 1914, Chapter 4, Section 108; and where, without written findings, a conclusion of law commuting the sentence of dismissal to suspension is made, it will be presumed the charges were sustained.

Courts—Orders Nunc Pro Tunc.

4. An order for a *nunc pro tunc* entry of findings not stating what conclusion of fact or law had been theretofore made is insufficient, and such entry must neither add to nor take from the original.

Municipal Corporations—Civil Service Board—Review—Rehearing.

5. A civil service board acting as a *quasi*-judicial tribunal for determining whether an officer was properly removed cannot grant a rehearing, unless specifically authorized by law.

[As to removal of officers for cause, see note in 135 **Am. St. Rep.** 250.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This proceeding was instituted December 9, 1915, in the Circuit Court of Multnomah County by M. E. Crowe against H. R. Albee, the then mayor of the City of Portland, Oregon, to compel the reinstatement of the plaintiff as a member of the police force of that municipality, from which he had been dismissed by the defendant. An alternative writ of *mandamus* was issued stating in effect that the City of Portland is a duly organized municipal corporation; that the defendant was the mayor thereof, and by the charter had the appointment and supervision of the police department and of the employees engaged therein; that on November 30, 1914, the plaintiff was and for several years prior thereto had been regularly and permanently appointed a patrolman as a member of the police department of that city, under the classified civil service rules at a monthly salary of $100; that on November

30, 1914, he was removed and discharged from the service by the defendant; that within ten days therefrom the plaintiff filed with the civil service board of that city a written demand for an investigation of his removal, alleging that his dismissal was for political or religious reasons, and not for the purpose of improving the public service; that at a meeting of such board held January 14, 1915, an investigation pursuant to such demand was had and evidence was submitted by the plaintiff and defendant; that on February 18, 1915, at a regular meeting of the board when were present two of the three members thereof, an order was made, the material part of which reads:

"That after having carefully considered all of the evidence presented in this case, it was found that the evidence presented on behalf of policeman Crowe's condition, warranted enough consideration to justify the following verdict, to-wit: That Mr. Crowe be suspended from the service from the date of his discharge, November 30, 1914, until May 1, 1915, and that an order be entered that he report for duty on May 1st aforesaid,"

of which order the plaintiff and defendant were duly notified; that on May 1, 1915, and on the first day of each subsequent month, the plaintiff presented himself for service and demanded of the defendant that he be reinstated at the monthly compensation he had been receiving, but such offer and request were refused; that on October 27, 1915, at a regular meeting of the civil service board, another order was made, relating to the application of the plaintiff for reinstatement, reciting the proceedings that were had and the conclusion reached at the original hearing, stating that the patrolman was discharged at the recommendation and upon the complaint of the chief of police

"of neglect of duty and conduct unbecoming an officer"; that the dismissal "was not made in good faith for the purpose of improving the public service; that it is to the benefit of public service to reinstate the said M. E. Crowe to his said position; that the said M. E. Crowe is entitled to reinstatement upon the following conditions; that he be reinstated and his said position restored to him as of date May 1, 1915, with pay from said date but that he be suspended during the interim. * * Inasmuch as the minutes of the board's proceedings held at its meeting February 18, 1915, do not state completely and accurately the board's then findings and order of that date in said matter, it is further ordered that these findings, order and proceedings be entered of record as of February 18, 1915."

The alternative writ further states that on November 20, 1915, due service of the latter order was accepted by the defendant, of whom the plaintiff on December 1st of that year, demanded restoration to the position of patrolman, but his application was denied; and that by reason of such order it was the duty of the defendant to reinstate the plaintiff who had no plain, speedy or adequate remedy at law for the relief sought.

A demurrer to the writ on the ground that it did not state facts sufficient to entitle the plaintiff to the restoration demanded was sustained, the proceedings dismissed and plaintiff appeals. AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. William A. Carter* and *Mr. Nelson R. Jacobson.*

For respondent there was a brief over the names of *Mr. Walter P. La Roche,* City Attorney, and *Mr. Stanley Myers,* Deputy City Attorney, with an oral argument by *Mr. Myers.*

MR. JUSTICE MOORE delivered the opinion of the court.

1, 2. There has been filed with the librarian of this court a duly certified copy of the charter of the City of Portland, of which organic act judicial notice is required to be taken: Chap. 273, Gen. Laws Or. 1917. Instead of using such duplicate, reference to sections thereof will be made to the charter, as revised by the council of that municipality August 19, 1914, and printed in pamphlet form. Thus the civil service board shall consist of three commissioners to be appointed by the mayor: Chap. IV, § 98. This board is required to classify offices, places and employments of the public service, and such positions when so arranged shall constitute the classified service of the city: Id., § 100.

"The Board shall make rules to carry out the purposes and provisions of this Article, which rules shall provide, in detail, the manner in which examinations shall be held, and appointments, promotions and removals made in pursuance thereof; and the board may, from time to time, change its rules": Id., § 101.

"The Mayor shall have the power to suspend, pending an official investigation, any officer of the city, except councilmen, for any official defalcation or willful neglect of duty, or official misconduct": Section 62.

"No employee in the classified civil service who shall have been permanently appointed under the provisions of this article shall be removed or discharged except for cause, a written statement of which, in general terms, shall be served upon him and a duplicate filed with the Board. Such removal or discharge may be made without any trial or hearing. Any employee so removed may within ten days from his removal file with the Board a written demand for investigation. If such demand shall allege, or if it shall otherwise appear to the Board that the discharge or removal was for political or religious reasons, or was not in good faith, for the purpose of improving the public

service the matter shall forthwith be investigated by or before the Board, or by or before some officer or board appointed by the Board to conduct such investigation. The investigation shall be confined to the determination of the question of whether such removal or discharge was or was not for political or religious reasons, or was or was not made in good faith for the purpose of improving the public service. The burden of proof shall be upon the discharged employee. On such grounds the Board may find that the employee so removed is entitled to reinstatement upon such conditions or terms as may be imposed, by the Board, or may affirm his removal. The findings of the Board, or such officer or board, when approved by the Board, shall be certified to the appointing officer and shall be forthwith enforced by such officer": Section 108.

The civil service board in the course of any investigation has power to subpoena witnesses, compel their attendance, administer oaths, examine into books, records, etc., and to compel their production.

"Willful false swearing in such investigations and examinations shall be perjury and punishable as such": Id., § 114.

If any rules were ever established by the civil service board, relating to examinations before it, no mention thereof is made in the writ, nor does that alternative command specify what written charges preferred against the plaintiff by the chief of police and addressed to the mayor, constituted on the part of the patrolman "neglect of duty and conduct unbecoming an officer."

It will be remembered that Section 108 of Chapter IV of the charter limits the investigation of the civil service board to a consideration of whether the removal of any person from the classified service was for political or religious reasons, or was not made in good faith for the purpose of improving the public service,

and that the burden of proof in such examination is imposed upon the discharged employee.

In *Imperial Water Co.* v. *Board of Supervisors,* 162 Cal. 14, 17 (120 Pac. 780), in speaking of the authority of a board of supervisors of a county in California, it is said:

"It does not follow, however, that where the legislature delegates such power to a local board and provides that it can be exercised only upon certain conditions and upon the ascertainment of certain facts by such board, after a notice and hearing to parties interested, that the proceeding thus authorized is not of a judicial character. Although such boards do not have the character of an ordinary court of law or equity, they frequently are required to exercise judicial functions in the course of the duties enjoined upon them."

In a note to the case of *Wulzen* v. *Board of Supervisors,* 40 Am. St. Rep. 17, 45 (101 Cal. 15, 35 Pac. 353), in speaking of removals from office, the editor of that valuable series of reports, remarks:

"Perhaps the clearest and best established illustration of the fact that an act not essentially judicial may be made so by requiring it to be preceded by an investigation, after due notice to the parties interested, is the class of cases arising under laws authorizing the removal of officers for cause and after the hearing of charges against them. To remove from office is generally an executive function—at all events, it is not essentially judicial, for the executive may be vested with this function to be exercised at his pleasure or caprice, or for such cause as to him may seem proper, and upon such inquiries as he may think best to make, or in the absence of any inquiry whatever. The power may also be vested as to municipalities and counties in their common councils, boards of supervisors, and other local authorities, and even then is not necessarily or ordinarily judicial or *quasi*-judicial. If, however, the law vesting the authority either in the Governor,

or in some local body, or otherwise, indicates that such authority shall be exercised for cause only, and either expressly or by implication that the officer against whom the proceeding is shall have notice thereof, and of the charges against him, and shall be entitled to be heard and produce evidence in his defense, then the proceeding is judicial in character, because the power to hear and determine is to be exercised, as in courts, only after notice and a hearing on the merits, and the officer is recognized as having a right in his office of which he cannot be deprived, except for proper cause ascertained by a proceeding judicial both in its form and in its consequences."

To the same effect see, also, *People* v. *Powell,* 127 Ill. App. 614; *Powell* v. *Bullis,* 221 Ill. 379 (77 N. E. 575); *Kammann* v. *City of Chicago,* 222 Ill. 63 (78 N. E. 16).

The conclusion reached in those cases was upon writs of *certiorari* wherein it was determined that the orders of such boards were not ministerial but judicial and, therefore, subject to re-examination by a court. The ancient remedy referred to is known in this state as the writ of review (Section 602, L. O. L.), and it lies only for the re-examination of judicial or *quasi*-judicial acts and not for ministerial orders: *Hodgdon* v. *Goodspeed,* 60 Or. 1 (118 Pac. 167).

"A writ of review," says Mr. Chief Justice EAKIN in *Cookinham* v. *Lewis,* 58 Or. 484, 488 (114 Pac. 88, 115 Pac. 342), "lies only in cases in which the lower court, officer or tribunal has exceeded its jurisdiction, or where it has exercised its judicial functions erroneously and contrary to the course of procedure applicable to the matter before it."

The proceeding herein is not a writ of review, which remedy is adverted to only for the purpose of showing that the civil service board of the City of Portland, when investigating an alleged improper removal

of an employee in the classified service of that municipality, who has been permanently appointed, acts as a *quasi*-judicial tribunal and its orders, to be invulnerable, must be consonant with, and not contrary to the course of procedure applicable to matters before it. See, however, Dillon's Mun. Corp. (5 ed.), Section 399, where it is stated that the powers of such a board are administrative or executive in their nature and not judicial, and hence the conclusions reached by such committee are not subject to be reviewed on *certiorari, mandamus* or otherwise, since the duty devolving upon the members of the board demands an exercise of judgment and discretion, which cannot be controlled by the courts.

No interference with the judgment or discretion of such boards should be tolerated under any circumstance, but courts will, upon proper application, reexamine the proceedings and determine whether or not the commissioners or boards had obtained jurisdiction of the persons of the adverse parties in the manner prescribed by the statute conferring the power and ascertain if the findings of fact and of law made by such *quasi*-judicial tribunals and the conclusions predicated upon such deductions, conform to the rules of practice and procedure governing such cases.

3. The order of the civil service board of February 18, 1915, makes no finding in respect to either of the questions that were submitted to and required to be considered and determined by it as to "whether such removal or discharge was or was not for political or religious reasons, or was or was not made in good faith for the purpose of improving the public service." It will be remembered that Section 108 of the charter regulating the procedure in an investigation of that kind, provides that "the board may find that the employee so

removed is entitled to reinstatement upon such conditions or terms as may be imposed by the board, or may affirm his removal." The material part of the order of February 18, 1915, is as follows:

"That Mr. Crowe be suspended from the service from the date of his discharge, November 30, 1914, until May 1, 1915, and that an order be entered that he report for duty on May 1st aforesaid."

The quoted language is a conclusion of law which is not based upon any expressed finding of fact. The effect of such deduction, when read in connection with the findings of fact made October 27, 1915, is equivalent to a determination that the written charges preferred against the plaintiff by the chief of police, and acted upon by the defendant, were true and that plaintiff was guilty "of neglect of duty and conduct unbecoming an officer," but that the sentence of removal should be commuted to a suspension for a definite time. As there were no written findings of fact made on February 18, 1915, no foundation was laid upon which could rest the substitution of one punishment for another after conviction, and this being so, the determination of the civil service board of that date was a nullity.

4. The findings of fact made October 27, 1915, are sufficient in the particulars mentioned. A part of the order of that time reads:

"Inasmuch as the minutes of the Board's proceedings held at its meeting February 18, 1915, do not state completely and accurately the Board's then findings and order of that date in said matter, it is further ordered that these findings, order and proceedings be entered of record as of February 18, 1915."

This excerpt does not show wherein the findings and order made at that time did not completely and accu-

rately state the decision upon the questions of fact that were then reached as a result of a judicial examination, or set forth in what particular the declaration then authoritatively given failed to announce the conclusion of law deduced from the findings of fact that were made. In *Grover* v. *Hawthorne,* 62 Or. 65, 75 (116 Pac. 100, 121 Pac. 804), Mr. Justice BEAN remarks:

"When a judgment has been actually rendered or an order made by the court which is entitled to be entered of record, but, owing to the misprision of the clerk, has not been so entered, the court may order the entry to be made *nunc pro tunc.* But it is not the function of the court to create an order now, which ought to have been passed at a former time. In ordering an entry made *nunc pro tunc,* not one jot or tittle should be added to or taken from the original judgment."

To the same effect see, also, *State* v. *Morgan,* 65 Or. 314 (132 Pac. 957); *Frederick & Nelson* v. *Bard,* 66 Or. 259 (134 Pac. 318); *Silliman* v. *Silliman,* 66 Or. 402 (133 Pac. 769); *Nat. Council* v. *McGinn,* 70 Or. 457 (138 Pac. 493); *Fisher* v. *Portland Ry. L. & P. Co.,* 74 Or. 229 (137 Pac. 763, 143 Pac. 992, 145 Pac. 277); *State* v. *Donahue,* 75 Or. 409 (144 Pac. 755, 147 Pac. 548). From a consideration of the opinions in these cases it would seem that the order of October 27, 1915, directing a *nunc pro tunc* entry to be made was insufficient for that purpose, because it was not stated what conclusion of fact and of law had been theretofore made. But however this may be, the question will not be determined since our decision herein will be put upon the legal principle that the power of the civil service board in investigating the dismissal of the plaintiff was exhausted February 18, 1915, by its first attempted exercise.

5. In *Renaud* v. *State Court of Mediation & Arbitration,* 124 Mich. 648 (83 N. W. 620, 83 Am. St. Rep. 346, 51 L. R. A. 458, 460), a controversy arose between employers and employed as to the reasonable scale of compensation which should be paid for manufacturing boots and shoes. In order to settle the dispute the parties jointly requested an arbitration, whereupon a hearing was had and a conclusion reached that was unsatisfactory to the employers upon whose petition a rehearing was ordered. Representatives of the employed instituted proceedings to prevent a re-examination of the issues which had been considered and determined, and it was held that *mandamus* would lie for that purpose. In referring to such special tribunal it was remarked:

"Has the court a right to grant a rehearing after it has once rendered its decision? From what has already been said, it is apparent that the purpose to be served by the establishment of this court is to have a speedy and inexpensive disposition of the differences submitted to it. It was not the purpose of the legislature to create what we ordinarily understand by a court of law. The Constitution provides that these courts shall have such powers and duties as shall be prescribed by law. The law which called this court into existence is the limit of its power. The act nowhere authorizes the court to grant a rehearing. When its decision has been rendered and filed, it has exhausted its power in a given case."

The purpose to be subserved by the municipal charter in creating the civil service board was to establish a tribunal for the speedy and final determination of investigations relating to the alleged improper removal or discharge from the classified list of persons who had been permanently employed. It was a very simple matter for the board to have determined from the evidence received whether or not the plaintiff had

been dismissed in good faith for the purpose of improving the public service. A rule of practice which, in the absence of any charter provision, would permit the board to amend its decision, eight months after it was rendered, would allow an unlimited time within which to make a correction in its final determinations. Believing such delays should not be sanctioned, we conclude no error was committed in dismissing the proceedings. The judgment is therefore affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Argued January 2, affirmed January 15, 1918.

FINLEY *v.* MORRISON.

(169 Pac. 781.)

Executors and Administrators—Sale of Land—Order of Publication.

1. Under Code directing that publication of citation to heirs on petition for sale of decedent's land shall be for not less than four weeks or for such further time as the court or judge may direct, an order dated July 31st, directing publication of citation on petition for sale of land for not less than ten weeks, and fixing October 2d as the return day, was valid, although there were only eight weeks between the dates named.

[As to construction of requirement of publication once per week for a certain number of weeks, see note in **Ann. Cas. 1917B, 209.**]

From Linn: WILLIAM GALLOWAY, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is a suit to quiet title. The undisputed facts are about as follows: Hugh P. Drennen, a resident of Clatsop County, was the owner of the land at the time of his death, April 13, 1899. John Chitwood was ap-

pointed administrator of the estate of the decedent and, having qualified, made a showing to the effect that the estate was insolvent and that it was therefore necessary to sell all of the real estate for the payment of decedent's debts. Upon such petition and showing, the court made an order on July 31, 1899, in the following form:

"Therefore it is hereby ordered and adjudged that citation issue herein to the heirs at law of said deceased and to all others interested in said estate to appear in this court on Monday the 2d day of October, 1899, at 10 o'clock in the forenoon of said day at the courtroom of this court at the courthouse, Astoria, Oregon, to show cause if any exist why the prayer of said petition to sell real estate described therein, should not be granted.

"It is further ordered that services on said heirs and others be made by publication of citation, in the 'Astoria Herald,' a weekly newspaper published at Astoria, Oregon, having a general circulation in said county and state, for not less than 10 successive weeks from the first day of publication and that return and proof of publication be made herein."

Pursuant thereto a notice was published in the newspaper designated, for eight successive weeks, the first publication being on August 5th, and the last on September 30th. On October 2d, the specified return day, an order was duly made directing the administrator to sell the land and thereafter the sale was made at public auction at which the plaintiff became the purchaser of the land involved herein, for the sum of $500. Being timber land the property has not since been in the actual possession of anybody, but plaintiff has regularly paid all taxes assessed against it. At the time of the sale it was not known that Drennen had any heirs, although great diligence had been exercised in seeking them. The proceeds of the sale were not suffi-

cient to pay the decedent's debts and the several creditors accepted lesser amounts in satisfaction of their claims. The sale to the plaintiff was confirmed and an administrator's deed executed December 7, 1899, which was recorded February 8, 1900. No adverse claim to the property was ever made until quitclaim deeds from parties claiming to be nephew and niece of decedent were recorded on July 27, 1915, and January 7, 1916. Upon learning the fact of such record plaintiff began this suit. A trial in the Circuit Court resulted in a decree for plaintiff and defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. R. Sleight.*

For respondent there was a brief over the names of *Messrs. Snow & McCamant* and *Mr. W. Lair Thompson,* with an oral argument by *Mr. Thompson.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. The one serious contention of the defendants is that the sale of the land by the administrator is void because the order directing a citation to issue to the heirs contains a direction that the notice shall be published for not less than ten successive weeks, and that it appears upon the face of the record that it was published for only eight weeks. The order fixes a definite return day, which is the first day of a regular term of the court. Between that day and the date upon which the order was passed (July 31st) there were not ten weeks intervening and that part of the order was of course impossible of performance. This being true, it appears beyond controversy that the provision for ten weeks of publication was a clerical error, either of com-

putation or of writing. The statute which provides for such publication directs that it shall be for "not less than four weeks, or for such further time as the court or judge may prescribe." The order would have been perfectly good and valid if it had been silent as to the number of weeks, for then the statutory time would be implied. The important thing in the citation is the date fixed for the hearing. It has been held that a mistake amounting to an impossibility appearing upon the face of a judgment will not destroy the judgment if enough remains after it is eliminated to disclose the actual judgment rendered: 1 Black on Judgments, § 123. The elimination of the impossible requirement of the order in this case leaves a perfectly good citation, from which it follows that the decree must be affirmed and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued October 29, 1917, affirmed January 15, 1918.

OREGON MILL & GRAIN CO. *v.* HYDE.*

(169 Pac. 791.)

Garnishment—Nature of Liability.

1. A garnishee is liable only because he is indebted to, or has property in his possession belonging to, the debtor, either in fact or in contemplation of law.

[As to garnishment as satisfaction of the principal debt, see note in 77 **Am. St. Rep.** 542.]

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*For a discussion of the question as to remedy of creditors where sale in violation of the bulk sales law, see notes in 39 **L. R. A. (N. S.)** 374, **L. R. A.** 1916A, 974.

As to effect of choosing by mistake remedy not legally available, see notes in 8 **L. R. A. (N. S.)** 144; 22 **L. R. A. (N. S.)** 1153. REPORTER.

Fraudulent Conveyances—Bulk Sales.

2. A seller's creditor may garnish goods transferred to a purchaser in violation of the bulk sales law (Sections 6069–6072, L. O. L.), as amended by Laws of 1913, page 537.

Fraudulent Conveyances—Bulk Sales Act—Effect.

3. Under the Bulk Sales Act (Sections 6069–6072, L. O. L.), as amended by Laws of 1913, page 537, making certain sales void as to the seller's creditors, a sale is valid between the seller and purchaser, and is merely voidable at the instance of the seller's creditors.

Fraudulent Conveyances—Bulk Sales—Ratification.

4. A seller's creditor may waive the fraud and ratify a sale in violation of the Bulk Sales Act (Sections 6069–6072, L. O. L.), as amended by Laws of 1913, page 537.

Fraudulent Conveyances—Proceedings Against Garnishee—Estoppel.

5. A judgment creditor's attempt to collect its debt directly from the judgment debtor, etc., *held* not to estop it from proceeding against a garnishee, who had not changed his position because of the creditor's action or statements.

Election of Remedies—What Constitutes.

6. A person commencing a suit in ignorance of substantial facts affording a different remedy, may, upon acquiring such information, adopt the alternate remedy.

Election of Remedies—Mistake as to Remedy.

7. A judgment creditor's right to set aside a sale by the debtor, void under Bulk Sales Act, Sections 6069–6072, L. O. L., as amended by Laws of 1913, page 537, is not precluded by its previous action against the purchaser upon a nonexisting promise to pay the debt involved, since pursuing a fancied remedy does not waive the real remedy.

From Baker: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

Chauncey Kirkpatrick has appealed from a judgment which was rendered against him as garnishee after the issuance of an execution on a judgment that had been obtained by the Oregon Mill & Grain Company, a corporation, against H. G. Hyde who once owned a grocery-store. Hyde purchased goods for his business and became indebted to various wholesalers, including the Oregon Mill & Grain Company. In the early days of 1911, Hyde sold his business and the entire stock of goods, valued at $4,000, to Chauncey

Kirkpatrick, who, in addition to a specified sum to be paid to Hyde, agreed to pay certain creditors who had sold goods to Hyde for use in the business. Hyde gave a bill of sale to Kirkpatrick; and this instrument contains a list of Hyde's creditors to be paid by Kirkpatrick. The name of the Oregon Mill & Grain Company does not appear in the list.

On February 14, 1912, the Oregon Mill & Grain Company commenced an action against Kirkpatrick to recover from him the amount which Hyde owed the corporation, on the theory that Kirkpatrick had agreed to pay Hyde's indebtedness to it. The goods in the store were attached as the property of Kirkpatrick. A trial resulted in a directed verdict and judgment for Kirkpatrick; and upon appeal to this court the judgment was affirmed in an opinion delivered in June, 1913, and reported in 66 Or. 21 (133 Pac. 69), on the ground that the bill of sale constituted the only competent evidence of the terms of sale, and that, since the name of the Oregon Mill & Grain Company did not appear among the names of the creditors given in the bill of sale, the corporation was without competent evidence to prove the agreement alleged by it.

Having failed in its attempt to recover from Kirkpatrick the Oregon Mill & Grain Company began an action against Hyde on September 25, 1913, to recover the price of the goods sold to him by the corporation. This action terminated on January 14, 1914, in a stipulated judgment for $716 against Hyde. An execution was issued on this judgment on January 30, 1914, and a copy of it and a notice of garnishment were left with Kirkpatrick who responded to the notice by certifying on February 20, 1914, that he had nothing in his possession or under his control "of any nature or description belonging to H. G. Hyde." Not being sat-

isfied with the certificate given by Kirkpatrick, the corporation obtained an order, as permitted by Section 303, L. O. L., requiring the garnishee to appear for examination. Written allegations and interrogatories were served upon the garnishee in compliance with Section 315, L. O. L.

In the meantime on February 5, 1914, Hyde had begun a suit against Kirkpatrick to reform the bill of sale by inserting in it the name of the Oregon Mill & Grain Company as one of the creditors to be paid by Kirkpatrick. Because of the pendency of the suit in equity the parties to the garnishment proceeding stipulated on November 5, 1914, that its progress should be stayed until a determination of the suit. A trial of the suit in the Circuit Court resulted in a decree reforming the bill of sale, as prayed for, and a judgment in favor of Hyde for $535.62 which was found to be the amount due from Hyde to the corporation. Upon an appeal to this court we rendered an opinion, reported in 78 Or. 466 (153 Pac. 41, 153 Pac. 488), in November, 1915, setting aside the judgment, reversing the decree and dismissing the suit, on the ground that the demurrer to the complaint should have been sustained because the pleading was not sufficient.

It also appears that on December 5, 1914, Hyde commenced an action against Kirkpatrick to recover $661.77, but subsequently on January 19, 1915, the action was dismissed on the motion of Hyde.

After the termination of the suit in equity, the Circuit Court, on January 18, 1916, heard and overruled a motion which the garnishee had filed against the allegations served upon him in the garnishment proceeding. The governing theory upon which the allegations were framed was that the sale to Kirkpatrick was void as against the Oregon Mill & Grain Company because

made without compliance with the requirement of the bulk sales act and that therefore Kirkpatrick stood in the position of a third person holding Hyde's property. The motion which the garnishee had filed and the court had overruled was directed against those parts of the allegations which referred to the violation of the Bulk Sales Act. The garnishee then returned the allegations and interrogatories with his written answer as directed by Section 316, L. O. L. The answer reiterates the affirmation, made in the certificate, that the garnishee neither owed Hyde any money nor had any property belonging to him. The garnishee refers to the action which Hyde commenced on December 5, 1914, and dismissed on January 19, 1915, narrates all the steps taken from the beginning to the end of the action prosecuted by the Oregon Mill & Grain Company against Kirkpatrick, and recites the entire story of the suit in equity brought by Hyde against Kirkpatrick; and, based upon these facts, the garnishee pleads the defense of former adjudication and also alleges that the Oregon Mill & Grain Company ought to be estopped to claim that the grocery-store belonged to Hyde because by prosecuting the action against Kirkpatrick the corporation elected to treat the store as property belonging to him.

Replying to the answer of the garnishee, the Oregon Mill & Grain Company explains the action which it unsuccessfully prosecuted against Kirkpatrick by averring that it was informed by both Hyde and Kirkpatrick that the latter would pay the debt owing from the former, and that acting upon such information, it pursued a mistaken remedy.

The Circuit Court concluded that a failure to observe the provisions of the Bulk Sales Act operated to void the sale as against the Oregon Mill & Grain Com-

pany and that therefore Kirkpatrick had in his possession property belonging to Hyde, and a judgment for $716 was accordingly rendered against Kirkpatrick in favor of the company. AFFIRMED.

For appellant (garnishee) there was a brief over the name of *Messrs. Clifford & Carrell,* with an oral argument by *Mr. Morton D. Clifford.*

For respondent there was a brief and an oral argument by *Mr. Orville B. Mount.*

MR. JUSTICE HARRIS delivered the opinion of the court.

Sections 6069 to 6072, L. O. L., as amended by Chapter 281, Laws 1913, and commonly referred to as the Bulk Sales Act, requires a written statement under oath containing the names and addresses of the creditors of the vendor, directs the giving of notice to such creditors, and provides that a sale of a stock of goods in bulk without complying with the act "shall, as to any and all creditors of the vendor, be conclusively presumed fraudulent and void." The sale by Hyde to Kirkpatrick was the sale of a stock of goods in bulk, and it was made without attempting to comply with the requirements of the Bulk Sales Act. The judgment in the garnishment proceeding is predicated upon the theory that as against the judgment creditor the Oregon Mill & Grain Company, the garnishee Kirkpatrick had in his possession property belonging to the judgment debtor, Hyde. The appeal is presented on the hypothesis that the suit in equity prosecuted by Hyde against Kirkpatrick and the action at law pursued by the corporation against Kirkpatrick constituted (1) an adjudication that Kirkpatrick was not

indebted to Hyde; and (2) an election by the corporation to approve the sale to Kirkpatrick.

1. The right of a judgment creditor to recover from a garnishee depends upon whether the garnishee has property belonging to or owes a debt to the judgment debtor. The garnishee becomes liable to the judgment creditor only because he is indebted to or has property in his possession belonging to the judgment debtor. The garnishee may have in his possession property which (1) is in fact or (2) is in contemplation of law, although not in fact, owned by the judgment debtor. It may be assumed, for the purposes of the instant case, that as between Hyde and Kirkpatrick the latter neither owes nor has in his possession property belonging to the former; and it may also be assumed, but it is not decided, that the court adjudicated in the suit prosecuted by Hyde and in the action maintained by the corporation against Kirkpatrick that the latter did not agree to pay Hyde's debt to the corporation. In brief, in order that the contention of the garnishee may be presented upon a statement of facts most favorable to him it may be assumed that he neither owed Hyde a debt nor agreed to pay Hyde's debt to the corporation; that as between Hyde and Kirkpatrick the latter did not have in his possession any property belonging to the former; and that it has already been determined by a final adjudication that Kirkpatrick did not agree to pay Hyde's debt to the Oregon Mill & Grain Company.

2. The sale of the stock of goods was valid as between Hyde and Kirkpatrick; and, therefore, as between them the latter did not have property which in fact belonged to the former: 12 R. C. L. 525. The statute, however, interposes and provides that as to the creditors of the vendor the sale shall "be conclusively presumed fraud-

ulent and void," so that while there may be a change of possession there cannot be a transfer of title if the Bulk Sales Act is not complied with, and hence the vendee holds in his possession property which in contemplation of law is still the property of the vendor; and since the vendee has property which in the eyes of the law belongs to the vendor a creditor of the latter can attach the property. If the vendee has sold or disposed of the property he is nevertheless liable to the creditors of the vendor to the extent of the value of the property and the proceeds of the sale may be garnished by such creditors, on the theory that the vendee stands in the position of a trustee who is responsible to the creditors for the disposition of the property: *Kohn* v. *Fishbach,* 36 Wash. 69 (78 Pac. 199, 104 Am. St. Rep. 941); *Owesso Carriage & S. Co.* v. *McIntosh & Warren* (Tex.), 179 S. W. 257; *Jaques & Tinsley Co.* v. *Carstarphen Warehouse Co.,* 131 Ga. 1 (62 S. E. 82); *Schneider* v. *Lee,* 33 Or. 578, 583 (17 Pac. 269); 12 R. C. L. 529. The right of the Oregon Mill & Grain Company to reach the stock of goods sold to Kirkpatrick does not depend upon whether Kirkpatrick had property which in truth belonged to Hyde; but its right depends upon whether Kirkpatrick had in his possession a stock of goods which had been delivered to him by Hyde without complying with the Bulk Sales Act and consequently it is immaterial whether Kirkpatrick owed a debt to or had property which in fact belongs to Hyde or whether the garnishee in truth agreed to pay the debt of Hyde or whether it was finally adjudicated that Kirkpatrick did not agree to pay Hyde's debt to the Oregon Mill & Grain Company.

3, 4. Although the word "void" is used, the plain meaning of the statute is that a sale is valid as between the seller and purchaser but it is merely voidable at the

instance of a creditor of the seller: 12 R. C. L. 474, 525; *McGreenery* v. *Murphy,* 76 N. H. 338 (82 Atl. 720, 39 L. R. A. (N. S.) 374). As said by Mr. Justice BURNETT in *Benson* v. *Johnson,* 85 Or. 677 (165 Pac. 1001, 1003), the legislation "vests in creditors a right which when acting for themselves they are at liberty either to assert or ignore"; and since a sale of a stock of goods is merely voidable at the instance of a creditor, the fraud which the law conclusively presumes to exist may be waived and the sale ratified by the creditor: *Bradtfeldt* v. *Cooke,* 27 Or. 194, 201 (40 Pac. 1, 50 Am. St. Rep. 701); *Rice* v. *West,* 80 Or. 640, 645 (157 Pac. 1105); *Knoop* v. *Kelsey,* 102 Mo. 291 (14 S. W. 110, 22 Am. St. Rep. 777, 779); 20 Cyc. 434; 12 R. C. L. 499; but as stated in Bump on Fraudulent Conveyances (4 ed.), Section 456,

"mere notice without any action on the part of the creditor, or mere acquiescence by taking no present measures to interfere with the transfer, does not amount to confirmation, for he can be precluded from assailing the transfer only on the ground of estoppel or agreement; there must be a benefit conferred upon him, or a disadvantage suffered by the grantee such as can bind the conscience of the former or clothe his act with the character of a contract."

It is not pretended that the corporation gave its consent before the sale was made and hence if the company is prevented from attacking the sale it is only because it has confirmed the sale either by acts and declarations which create an estoppel *in pais* or by an election of remedies.

5. Kirkpatrick has not sustained any loss, or suffered any detriment or changed his position by reason of any act or declaration of the corporation; nor has the corporation gained any advantage or benefit by reason of any act done or any declaration made by it. Kirk-

patrick has neither done anything that he would not have done nor omitted to do anything that he would have done except for the acts or declarations of the corporation. Even though the Oregon Mill & Grain Company were until now unknown to Kirkpatrick nevertheless he would have done exactly as he did do. The conduct of the corporation did not work an estoppel *in pais: Marquette County Sav. Bk.* v. *Koivisto*, 162 Mich. 554 (127 N. W. 680).

6, 7. We now come to a consideration of the question of whether the prosecution of the action by the Oregon Mill & Grain Company against Kirkpatrick operated as an election of remedies so as to preclude the right subsequently to resort to garnishment. Election of remedies is defined in 15 Cyc. 252, thus:

"Election of remedies has been defined to be the right to choose, or the act of choosing between different actions or remedies, where plaintiff has suffered one species of wrong from the act complained of. And broadly speaking, an election of remedies is the choice by a party to an action of one of two or more coexisting remedial rights, where several such rights arise out of the same facts; but the term has been generally limited to a choice by a party between inconsistent remedial rights."

See also: *Kearney Milling & Elevator Co.* v. *Union Pacific Ry. Co.*, 97 Iowa, 719 (66 N. W. 1059, 59 Am. St. Rep. 434, 439). An election of remedies is defined in 9 R. C. L. 956

"as the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts."

The basis of the application of the doctrine, as stated in *Mills* v. *Parkhurst*, 126 N. Y. 89 (26 N. E. 1041, 13 L. R. A. 472, 474),

"is in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other."

The same facts may create two or more remedial rights each of which is inconsistent with the other, and all of which exist in a state of suspension until one of them is selected by the person entitled to choose; but when he makes his choice the right chosen is preserved and from that moment becomes the only one available to him, while all the rest are dissolved and cease to exist. Illustrations without number could be given. Our own precedents illustrate the doctrine. If a person is intrusted with chattels with power to sell pledges the property to secure advances made on his own account, the owner can sue him for the value of the property converted or he can sue on the contract; but the owner cannot have both remedies: *Nichols* v. *Gage,* 10 Or. 82, 85. The breach of a contract providing for the conditional sale of personal property gives the seller more than one remedial right; but if he undertakes to recover the price he cannot afterwards change his position and recover the property in specie: *Francis* v. *Bohart,* 76 Or. 1 (143 Pac. 920, 147 Pac. 755, L. R. A. 1916A, 922); *American Process Company* v. *Florida White Pressed Brick Co.,* 56 Fla. 116 (47 South. 942, 16 Ann. Cas. 1054). The rule itself is simple enough although the application of it is sometimes difficult and occasionally confusing; and perhaps as suggested in *Rowell* v. *Smith,* 123 Wis. 510 (102 N. W. 1, 3 Ann. Cas. 773), some of the seeming conflict of judicial opinion arises out of a failure to observe the finer distinctions between the doctrines of estoppel *in pais, res adjudicata* and election of reme-

dies. The question of whether coexisting remedial rights are inconsistent with each other is to be determined by a consideration of the relation of the parties with reference to the right attempted to be enforced: *American Process Co.* v. *Florida White Pressed Brick Co.,* 56 Fla. 116 (47 South. 942, 16 Ann. Cas. 1054); *Capital City Bank* v. *Hilson,* 64 Fla. 206 (60 South. 189, Ann. Cas. 1914B, 1211); *Rowell* v. *Smith,* 123 Wis. 510 (102 N. W. 1, 3 Ann. Cas. 773).

It is not necessary to determine whether the mere commencement of an action to enforce one of two or more coexisting but inconsistent remedial rights operates as an irrevocable selection, although the clear weight of judicial opinion is to the effect that the commencement of a suit or action is an election: *Frisch* v. *Wells,* 200 Mass. 429 (86 N. E. 775, 23 L. R. A. (N. S.) 144); *Conrow* v. *Little,* 115 N. Y. 387 (22 N. E. 346, 5 L. R. A. 693); *Rowell* v. *Smith,* 123 Wis. 510 (102 N. W. 1, 3 Ann. Cas. 773); *Grizzard* v. *Fite,* 137 Tenn. 103 (191 S. W. 969, L. R. A. 1917D, 652); 15 Cyc. 259; 7 Ency. Pl. & Pr. 368. In a few jurisdictions, however, the mere commencement of a suit or action does not prevent the plaintiff from dismissing it and pursuing another remedy: *Johnson-Brinkman Com. Co.* v. *Missouri Pacific Ry. Co.,* 126 Mo. 344 (28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840); 9 R. C. L. 961.

The selection of one of two or more coexisting, inconsistent remedial rights is not irrevocable however unless made with a knowledge of the facts out of which such rights arise; and hence if one commences a suit or action in ignorance of the substantial facts which offer an alternate remedy, he may, when informed, adopt a different remedy: *Rehfield* v. *Winters,* 62 Or. 299, 305 (125 Pac. 289); *Kearney Milling & Elevator Co.*

v. *Union Pacific Ry. Co.*, 97 Iowa, 719 (66 N. W. 1059, 58 Am. St. Rep. 434); *Zimmerman* v. *Robinson & Co.*, 128 Iowa, 72 (102 N. W. 814, 5 Ann. Cas. 960); *Moline Plow Company* v. *Rodgers*, 53 Kan. 743 (37 Pac. 111, 42 Am. St. Rep. 317); *Murphy* v. *Hutchinson*, 93 Miss. 643 (48 South. 178, 17 Ann. Cas. 611, 21 L. R. A. (N. S.) 785); 15 Cyc. 261; 9 R. C. L. 962. The Oregon Mill & Grain Company excuses the prosecution of the action at law against Kirkpatrick by alleging and offering evidence to show that it was induced to bring the action by statements made by both Hyde and Kirkpatrick. We do not find it necessary to decide whether the excuse offered is sufficient to bring the corporation within the rule which permits a party to surrender the remedial right previously asserted and to adopt another inconsistent right in lieu of the one surrendered, but we shall proceed to inquire whether the Oregon Mill & Grain Company did in fact select one of two or more coexisting, inconsistent remedial rights when it brought the action at law against Kirkpatrick.

The garnishment proceeding arises out of the fact that Hyde owes the corporation and Kirkpatrick has property which in contemplation of law belongs to Hyde and can be applied upon his debt. When Hyde sold to Kirkpatrick, the corporation confessedly had the right to attach the property purchased by Kirkpatrick but it did not have an independent right to compel Kirkpatrick to pay Hyde's debt because Kirkpatrick had not agreed to pay it. It must be admitted that the right to recover from Hyde and the right to attach the goods in Kirkpatrick's possession existed when the purchase was completed and that such right of attachment still exists unless defeated by the election of an inconsistent coexistent right. Kirkpatrick contends and it is here assumed that he never agreed to

pay Hyde's debt and therefore the corporation never at any time had the independent right to compel Kirkpatrick to pay Hyde's debt. The situation presented here then is one where it is conceded that immediately after the sale the corporation had the right it now seeks to enforce, but never at any time had the right it first asserted. In other words, the corporation did not at first assert a right that it did have, but it only asserted a right that it did not have. The corporation was mistaken. There were not in fact or in law two or more rights from which to choose although one remedial right did actually exist. There would be neither justice nor sense in a rule that takes from a person that which he has merely because he claims that which he does not have. Our attention has not been directed to a single adjudicated case involving a state of facts analogous to those presented here and supporting the position taken by the garnishee. If Kirkpatrick had promised to pay Hyde's debt then one of two rights would have been available to the corporation; and a different state of facts would also be presented if Kirkpatrick had been indebted to Hyde for all or a portion of the purchase price and that debt had been attached by the corporation for the payment of Hyde's debt: *Carter* v. *Smith,* 23 Wis. 497. The garnishee in the instant case, however, is arguing that the corporation must lose what all parties are obliged to admit was a once existing right, solely because it asserted a right which never existed at any time. The pursuit of a fancied remedy is not penalized by the loss of a real remedy. The attempt upon the part of the corporation to collect from Kirkpatrick by a direct action against him was the pursuit of a fancied remedy; the right to sue Hyde directly and to attach the property in Kirkpatrick's possession was a real right

which actually existed and, therefore, the prosecution of the action at law against Kirkpatrick was a fancied remedy while the garnishment proceeding is a real remedy. In the well-considered case of *American Process Co.* v. *Florida White Pressed Brick Co.,* 56 Fla. 116 (47 South. 942, 16 Ann. Cas. 1054), the court uses the following language:

"If in fact or in law only one remedy exists and a mistaken remedy is pursued the proper remedy is not thereby waived. Where more than one remedy for the enforcement of a particular right actually exists, and such remedies considered with reference to the relation of the parties as asserted in the pleadings are inconsistent, the pursuit of one with knowledge of the facts is in law a waiver of the right to pursue the other inconsistent remedy."

The rule that the assertion of a mistaken remedy does not preclude the enforcement of a real remedy is thoroughly established by the opinions of courts and text-writers: *Powell* v. *Dayton, S. & G. R. R. Co.,* 16 Or. 33, 43 (16 Pac. 833, 8 Am. St. Rep. 251); *Morris* v. *Sheridan,* 86 Or. 224 (167 Pac. 593, 596); *Rehfield* v. *Winters,* 62 Or. 299, 306 (125 Pac. 289); *Capital City Bank* v. *Hilson,* 64 Fla. 206 (60 South. 189, Ann. Cas. 1914B, 1211); *McCoy* v. *McCoy,* 32 Ind. App. 38 (69 N. E. 193, 102 Am. St. Rep. 223); *Bolton Mines Co.* v. *Stokes,* 82 Md. 50 (33 Atl. 491, 31 L. R. A. 789); *Henry* v. *Herrington,* 193 N. Y. 218 (86 N. E. 29, 20 L. R. A. (N. S.) 249, 251); *Rowell* v. *Smith,* 123 Wis. 510 (102 N. W. 1, 3 Ann. Cas. 773); *Fuller-Warren Co.* v. *Harter,* 110 Wis. 80 (85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603); *Clausen* v. *Head,* 110 Wis. 405 (85 N. W. 1028, 84 Am. St. Rep. 933); *Zimmerman* v. *Robinson & Co.,* 128 Iowa, 72 (102 N. W. 814, 5 Ann. Cas. 960); *Harrill* v. *Davis,* 168 Fed. 187 (94 C. C. A. 47, 22 L. R. A. (N. S.) 1153); *Agar* v. *Winslow,* 123

Cal. 587 (56 Pac. 422, 69 Am. St. Rep. 84); *Wells* v. *Western Union Tel. Co.*, 144 Iowa, 605 (123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045); *Clark* v. *Heath*, 101 Me. 530 (64 Atl. 913, 8 L. R. A. (N. S.) 144); *Snow* v. *Alley*, 156 Mass. 193 (30 N. E. 691); *Johnson-Brinkman Com. Co.* v. *Central Bank*, 116 Mo. 558 (22 S. W. 813, 38 Am. St. Rep. 615, 625); 15 Cyc. 262; 9 R. C. L. 962; 7 Ency. Pl. & Pr. 366.

The action at law brought by the corporation against Kirkpatrick was decided by this court on June 3, 1913, and a petition for rehearing was denied on July 15, 1913. On September 25, 1913, the corporation commenced the action at law against Hyde. A judgment was obtained against Hyde on January 4, 1914, and Kirkpatrick was served with notice of garnishment on February 10, 1914.

Assuming without deciding that the garnishee could plead laches and that he has sufficiently pleaded it, nevertheless that defense is unavailing because the evidence fails to support it: *Rowell* v. *Smith*, 123 Wis. 510 (102 N. W. 1, 3 Ann. Cas. 773, 778); *Wills* v. *Nehalem Coal Co.*, 52 Or. 70 (96 Pac. 528). The judgment is affirmed. AFFIRMED.

Argued January 2, affirmed January 15, 1918.

KENDALL *v.* TRAVELERS' PROTECTIVE ASSOCIATION.*

(169 Pac. 751.)

Insurance—Accidents—Admissibility of Evidence.

1. In action on a policy insuring against accidents causing disability to transact business, testimony regarding plaintiff's suffering, etc., is inadmissible.

Insurance—Fraternal Benefit Insurance—Instructions.

2. In action on a benefit accident policy, refusing requested instructions that defendant's constitution and by-laws were binding upon plaintiff, *held* erroneous.

Insurance—Accident Policy—Pleading.

3. Plaintiff's allegation that he had complied with all terms of an accident insurance policy, *held* sufficient under the direct provisions of Section 88, L. O. L.

Insurance—Accident Policy—Departure—Pleading.

4. Where plaintiff's allegation that he had complied with all provisions of an insurance policy was denied by an answer stating the required notice was not given, plaintiff's reply that such failure was excused by his physical disability, etc., *held* not a departure.

Insurance—Accident Policy—Time to Give Notice.

5. An accident policy requiring notice of injury within thirty days, unless insured was unconscious or disabled, is not breached by insured's failure to give such notice during some seven days following the accident, before plaintiff became physically disabled.

[As to notice of accident within time required by terms of accident insurance policy as condition precedent to recovery, see note in **Ann. Cas.** 1914D, 412.]

Insurance—Accident Policy—Requested Instruction.

6. In action on a fraternal accident policy, defendant's requested instruction that plaintiff was bound by its constitution and by-laws although he and his family were ignorant thereof, was properly refused because of the reference to plaintiff's family.

Insurance—Accident Policy—Jury Question.

7. Evidence regarding the manner in which a barber removed an ingrowing hair from plaintiff's face, with his consent, resulting in

*As to what constitutes external and visible signs of injury within exemption provisions of accident policy, see note in 49 **L. R. A. (N. S.)** 1022.

On effect of undevelopment of injury as affecting time for giving the notice required by an accident insurance policy, see note in 14 **L. R. A. (N. S.)** 503.

poisoning, etc., *held* to make a jury question whether the injury was accidental within a fraternal benefit policy.

Insurance—Accident Policy—"Accidental Means."

8. A wound intentionally made by a barber in removing an ingrowing hair from plaintiff's face, with his consent, *held* not made by "accidental means" within a fraternal benefit policy.

Insurance—Accident Policy—Time to Sue.

9. Where a fraternal benefit association's constitution required claims to be presented after total recovery, and authorized benefits for 2 years' disability, a suit for 32 months' disability, commenced 7 months after refusal of the claim, *held* brought in time, although the constitution required suit to be brought within 6 months after the claim's refusal.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

It is alleged and admitted that the defendant is a corporation engaged in fraternal insurance business and at the time of happenings named in the complaint the plaintiff was a member in good standing thereof. He avers:

"That on or about the thirteenth day of November, 1914, a barber, while endeavoring to remove some ingrowing hairs, accidentally penetrated or broke the skin on the point of plaintiff's chin, thereby causing an open wound, into which an infection was introduced, as a result of which plaintiff became ill and was incapacitated and wholly disabled for transacting any business for a period of thirty-one weeks and six days, and was partially disabled thereafter for a period of one week and one day."

He states also that, according to the constitution and by-laws of the defendant, the rate of indemnity for total disability is twenty-five dollars a week, and for partial disability, twelve dollars and a half per week. Stating that he has performed all the conditions on his part to be fulfilled to obtain the indemnity which the defendant has refused to pay, he demands judgment for $810.70. The quoted allegations about the

injury and the performance of the stipulations by the plaintiff are denied. The rates of indemnity are admitted.

Three affirmative defenses are set up. The first is in this language:

"That the injuries described in the complaint were voluntarily inflicted upon the plaintiff by himself through the barber referred to in paragraph III of the complaint, who acted at the instance of plaintiff, and who acted intentionally; that the removal of the ingrowing hair from the plaintiff's chin, as alleged in the third paragraph of the complaint, was not a violent or accidental act; that on the contrary it was intentional and with the consent of plaintiff; that the disability relied upon as the ground of plaintiff's cause of action resulted from infection and the infection was not introduced into, by, and through an open wound caused by violent or accidental means; that the removal of the ingrowing hair referred to in the third paragraph of the complaint was surgical treatment, although plaintiff elected to have the same done by a barber. That plaintiff's injuries were not wholly or at all due to accident, but were wholly due to bodily infirmity, disease, poison, infection and the voluntary act of plaintiff and the barber referred to in the complaint."

The second is to the effect that although not unconscious or physically unable to do so, the plaintiff did not give the defendant any information of his injury until more than thirty days thereafter, notwithstanding the rules of the institution required that notice be given within that period under such circumstances. The third is in substance that it was agreed that no action against the defendant for the recovery of any claim arising under the certificate of membership or the constitution and by-laws shall be sustained unless commenced within six months after the refusal of the defendant to pay the same, and that although the defendant refused to pay the plaintiff's demand of all of

which the latter received notice not later than January 21, 1915, this action was not commenced until August 28th of that year. All these defenses are prefaced by the admitted allegations to the effect that the defendant is a fraternal insurance society, the constitution and by-laws of which are binding upon its members, and that the plaintiff stipulated that he would comply with all their regulations and accept the same as clearly defining the rights and obligations incident to his membership. These are accompanied by certain conceded excerpts from the constitution of the defendant, which are more fully set forth in the opinion. Otherwise the answers are denied.

Further replying and excusing his failure to give notice within thirty days after the accident the plaintiff avers that immediately after its occurrence he became unconscious and physically unable to communicate with the defendant and so continued a long time after the date of the first notice which was given for him by his son on December 22, 1914.

The case was heard by a jury and the result was a verdict and judgment for the plaintiff which the court set aside and granted a new trial. From this last order the plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. Wilbur Henderson, Messrs. Davis & Farrell* and *Mr. E. K. Oppenheimer,* with oral arguments by *Mr. Henderson* and *Mr. Wilfred E. Farrell.*

For respondent there was a brief over the names of *Mr. W. Lair Thompson, Messrs. Snow & McCamant* and *Mr. MacCormac Snow,* with an oral argument by *Mr. Thompson.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The constitution and by-laws of the defendant which confessedly affect this case read thus:

"Article IX.

"Sec. 3. Whenever a member of this Association in good standing shall, through external, violent and accidental means, receive bodily injuries which shall independently of all other causes immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation as shown by the records of this Association, he shall be paid for the loss of time occasioned thereby the sum of $25.00 per week, not exceeding one hundred and four consecutive weeks, and $12.50 per week for partial disability.

"Sec. 7. All claims for benefits or indemnity under the benefit certificate of a member in good standing and this Constitution must be made to the National Board of Directors. Such claims are not divisible and must be presented after the total recovery of the member.

"Sec. 8. Any member in good standing meeting with any accident, as described in this article, must notify the National Secretary in writing within thirty days, giving full particulars of same and name of attending physician. In case of death the beneficiary shall give such notice within thirty days. In case of failure to notify, except because of unconsciousness or physical inability, the member or his beneficiary in case of death shall forfeit all rights to insurance benefits. * * The forwarding of blanks for the purpose of proofs as above provided or the investigation of any claim by any one authorized to represent the Association or the holding of an autopsy under the direction of the Association shall not constitute or be a waiver of any right or of any defense which the Association may have against any claim made against it.

"Sec. 9. No action against this Association for the recovery of any claim arising under the certificate of membership or the Constitution and By-Laws shall be

sustained unless commenced within six months after the refusal of the Association to pay the same and a lapse of such period shall be conclusive evidence against the validity of such claim asserted if an action for its enforcement be subsequently commenced.

"Sec. 12. None of the officers, directors, or members of this Association, and no State Division or local Post or any officer thereof, shall have the power or authority to waive any of the provisions of the Charter, Constitution or By-Laws of this Association, nor to adopt any rule or provision in connection therewith, except as herein provided. The Charter, Constitution and By-Laws, with all amendments thereto, shall be binding upon the Association and on each and every member thereof, and on all beneficiaries of members."

"Article X.

"Sec. 2. This Association shall not be liable in case of injury, fatal or otherwise, inflicted by a member in good standing on himself, or in case of * * death or disability when caused wholly or in part by any bodily or mental infirmity or disease or by intentional injuries causing death or disability inflicted by the member, or any other person, upon him * * or injury, fatal or otherwise, resulting from any poison or infection (unless the infection is introduced into, by, or through an open wound, which open wound must be caused by external, violent, and accidental means and be visible to the naked eye) * * or disability resulting from medical or surgical treatment * * nor shall the Association be liable in any case where the injury or death is not caused by external, violent, and accidental means independently of all other causes and is not the sole or proximate cause of the death or disability."

1. One matter to be determined is whether the plaintiff was wholly disabled from transacting any and every kind of business pertaining to his occupation. The matter in dispute is one of cold contract and is not one of damages involving degrees of suffering. Notwithstanding this, over the objections of the defendant, the

plaintiff by his counsel persistently went into extreme details, relating the different surgical operations performed upon him during his sickness, the suppuration of the wounds, all his suffering and his present condition. His case could have been proved in that respect by the simple statement that he was unable to pursue his occupation for the length of time stated. If he had been painlessly paralyzed by an accident within the meaning of his certificate of membership to the extent that it would have wholly prevented him from transacting his business, he would have been entitled to recover so far as that branch of the case was concerned. The amount or intensity of his suffering was immaterial. It could not add to nor take from the amount of his recovery if he was entitled to recover at all. The only effect its recital could have would be to prejudice the jury in its consideration of the issues involved. The admission of this testimony was one of the grounds of the defendant's motion for a new trial. On that basis alone the court was right in setting aside the judgment.

2. In view of the probability of a new trial, however, it becomes necessary to consider the other assignments of error mentioned in the motion. These are predicated upon the refusal of the court to give the instructions requested by the defendant. The first of these, being a peremptory instruction to find for the defendant, we will pass without further comment. The second reads thus:

"It is admitted in the pleadings that the defendant is a fraternal insurance corporation or association and that the plaintiff was in good standing in this Association on the 13th of November, 1914. The pleadings also admit a number of the provisions contained in the constitution and by-laws of the defendant. The jury is instructed that all of these provisions contained in the

constitution and by-laws of the defendant corporation and alleged in the answer of the defendant are binding upon the plaintiff and plaintiff can only recover in this case by showing that under the terms and conditions contained in the constitution and by-laws of the defendant plaintiff is entitled to recover."

This instruction contains a general statement of the principles governing a recovery by the plaintiff and should have been given to the jury.

3–5. The third is as follows:

"It is provided in the constitution of the defendant that any member claiming a right to recover for an accident sustained by him must notify the National Secretary of the defendant within thirty days. The failure to give the notice within this time may be excused by unconsciousness or physical inability on the part of the member. The jury is instructed that the unconsciousness or physical inability referred to in the constitution of the defendant which will excuse giving notice within thirty days is an unconsciousness or physical inability which continues during the entire thirty days, or during the period elapsing between the discovery by plaintiff that his injury was material and the expiration of said thirty day period. If therefore you find from the evidence that on the evening of the 13th of November, 1914, the plaintiff suffered pain as the result of the abrasion of his skin on that day and that the sore got worse on the following days and that at some later time from three to seven days after the incident of which he complains plaintiff regarded the sore as sufficiently serious to justify calling a physician and that up to the time when plaintiff first consulted a physician he was conscious and able to write, or able to request someone else to write to the defendant, and that as a matter of fact no notice was given to the defendant of the incident until more than thirty days subsequent to the 13th of November, 1914, then I instruct you that plaintiff cannot recover and your verdict should be for the defendant."

In our judgment the plaintiff was entitled to full thirty days within which to inform the defendant of his injury and a notification on the thirtieth day of such a period next ensuing after the accident, during all of which he was conscious and able, would have been in ample time. The forfeiture clause respecting failure to notify contains the exception "because of unconsciousness or physical inability." The manifest object of this qualification is to extend the time rather than to shorten it. Manifestly it was not the design of the contracting parties to impose upon one who was in fact unable to give it, greater promptness of notice than upon one who was at all times able to notify the insurer. The plaintiff was entitled to rely upon his allegation in the complaint that he had performed all the conditions of the contract on his part: Section 88, L. O. L. When this was challenged by the defendant's answer to the effect that the plaintiff had not given notice until more than thirty days after the injury he was entitled to rest in his reply upon the exception of unconsciousness or inability to notify the defendant. This is not a departure, but rather an affirmance of the general allegation of the complaint to the effect that he had observed the stipulation on his part.

The authorities cited in support of the contention of the defendant on this point are without exception those where the injured person is required either to give immediate notice or within a certain time, without any qualification whatever for unconsciousness or inability as allowed in the instant case. For instance, in *Hatch* v. *United States Casualty Co.*, 197 Mass. 101 (83 N. E. 398, 125 Am. St. Rep. 332, 14 Ann. Cas. 290, 14 L. R. A. (N. S.) 503), the policy required a notice within ten days of the event causing the injury. The decedent fell on July 7th, but thought nothing of it and gave no

notice. He became ill August 7th and died on the eleventh of that month, after which his beneficiaries gave notice of the event happening more than a month before. It was properly held that there was a failure to comply with the contract in that respect. So, in *Northwestern Telephone Co.* v. *Maryland Casualty Co.*, 86 Minn. 467 (90 N. W. 1110), the policy required immediate notice of the accident where the claimant had taken insurance against liability for injuries to its employees. Through its foreman, the plaintiff there had notice of the accident at the time it happened but not until the employee sued it about a year afterwards did it inform the insurer. Under these circumstances it failed in its action against the Casualty Company. *Travelers' Ins. Co.* v. *Myers*, 62 Ohio St. 529 (57 N. E. 458, 49 L. R. A. 760), *Travelers' Ins. Co.* v. *Nax*, 142 Fed. 653 (73 C. C. A. 649), and *Heywood* v. *Maine Mutual Assn.*, 85 Me. 289 (27 Atl. 154), are all "immediate notice" cases without any qualification. In *Parker* v. *Farmers' Fire Ins. Co.*, 179 Mass. 528 (61 N. E. 215), a fire occurred October 3d. The policy required a sworn statement "forthwith to be rendered to the company." Four days after the fire, the insured went to visit a sick child. At intervals thereafter she was either sick herself or some one of her family was, and notice was not given until the 10th or 12th of December. This was held not to be in compliance with the stipulation. In that case, as well as in *United Benev. Soc.* v. *Freeman*, 111 Ga. 355 (36 S. E. 764), and *North American Accident Ins. Co.* v. *Watson*, 6 Ga. App. 193 (64 S. E. 693), there was no exception or qualification annexed to the time within which notice was required. In the case before us for consideration the exception is the saving grace for the plaintiff. There was evidence which the jury

was entitled to consider, respecting his unconsciousness and physical disability to give the notice until it was given for him after the expiration of the thirty-day period. The instruction requested, therefore, was properly refused, it being to the effect that if he was conscious at any time during the period of thirty days next following the alleged accident, he was bound to have given notice and was not excused by subsequent unconsciousness or disability happening within the remainder of the time.

6. The fourth instruction requested by the defendant is here set down:

"The jury is instructed that plaintiff was bound to know the contents of the constitution and by-laws of the defendant corporation and that he cannot excuse himself for failure to comply with the provisions contained in the constitution and by-laws by showing that he and the members of his family were in fact ignorant of their contents."

This instruction is clouded by the clause relating to the members of the plaintiff's family, which is not in conformity with the issues involved. It was properly refused.

7–9. The two remaining, five and six, are in these words:

"The jury is instructed that if plaintiff directed the barber to remove the ingrowing hairs from his chin and the barber proceeded to remove the hair under instructions from plaintiff, plaintiff cannot recover in this case, even though the work of the barber was unskilfully done and the results were such that neither the plaintiff nor barber anticipated."

"If the abrasion of plaintiff's chin was due to the intentional act of the barber in endeavoring to remove an ingrowing hair thereon plaintiff cannot recover and your verdict should be for the defendant."

We note that the defendant does not insure merely against injuries although they might constitute an unexpected effect. The damage, whether anticipated or not as a result, must have happened through accidental, violent and external means. All three of these ingredients must unite to form the cause of the subsequent hurt before there can be a recovery under the admitted terms laid down in the constitution and by-laws of the defendant. A man's leg might be broken by a runaway team coming suddenly upon him from behind. He might reasonably expect to be confined to his bed for some weeks and yet the cause of the fracture would be accidental. On the other hand, he might purposely inflict upon himself a slight pin scratch which would ordinarily pass unnoticed and septicaemia might ensue and unexpectedly amputation of the injured part might become necessary, yet the scratch would not be accidental. In other words, under such a policy as this the liability must be determined by causes rather than consequences.

It may be conceded that the injury inflicted by the barber's tweezers was external. We cannot stop to weigh and haggle about the degree of violence involved. The question to be determined is whether the cause of the injury was accidental and whether the instructions asked for should have been given. A brief allusion to the testimony about what happened in the barber-shop is here appropriate. Plaintiff gave a narration about going into the shop and taking the first chair and that the barber shaved him and cut his hair. In speaking of the barber, plaintiff stated:

"He said that there was a dead hair in my chin, and he went to work with his tweezers and took it out. At that time, at that moment, the towel-supply man was either coming in or going out. Anyway, he got

into an altercation with him just as he made the attempt to get the hair, and he looked up, and he jabbed those tweezers into the skin and took out quite a little piece of it with the tweezers, in attempting to get the hair."

On cross-examination he testified as follows:

"Q. How many ingrowing hairs were there on your chin?

"A. I don't know.

"Q. Did the barber remove those at your request?

"A. He called my attention to it and I requested him to.

"Q. He called your attention to the hair and you told him to pull it out?

"A. Yes, sir.

"Q. His effort in pulling it out was pursuant to your request?

"A. I requested him to, though he suggested it himself."

Again, in his final claim to the defendant, in describing the accident which caused the injury the plaintiff used this language:

"I asked barber to remove some ingrowing hairs from point of my chin. In doing so he produced a wound which became infected."

The barber was not produced as a witness. In the light of the issues framed by the pleadings, it became a question of fact for the jury to determine whether the means producing the injury was accidental or not. The jury might consider that it was impossible to perform the required operation without making some incision of the skin so as to reach the hair growing underneath, and that on that account the barber intentionally and with the implied consent at least of the plaintiff, made the cut which afterwards became infected. This would not be an unwarranted conclusion

from the plaintiff's own testimony. If, therefore, the wound was made intentionally it would not come within the meaning of the term "accidental means." Consequently the fifth and sixth instructions should have been given to the jury: *Stone* v. *Fidelity & Casualty Co.,* 133 Tenn. 672 (182 S. W. 252, Ann. Cas. 1917A, 86, L. R. A. 1916D, 536); *Carnes* v. *Iowa State Traveling Men's Assn.,* 106 Iowa, 281 (76 N. W. 683, 68 Am. St. Rep. 306); *Feder* v. *Iowa State Traveling Men's Assn.,* 107 Iowa, 538 (78 N. W. 252, 70 Am. St. Rep. 212, 43 L. R. A. 693); *Smouse* v. *Iowa State Traveling Men's Assn.,* 118 Iowa, 436 (92 N. W. 53); *Schmid* v. *Indiana Travelers' Acc. Assn.,* 42 Ind. App. 483 (85 N. E. 1032); *Lehman* v. *Great Western Acc. Assn.,* 155 Iowa, 737 (133 N. W. 752, 42 L. R. A. (N. S.) 562); *Hastings* v. *Travelers' Ins. Co.,* 190 Fed. 258; *Shanberg* v. *Fidelity & Casualty Co.,* 158 Fed. 1, 5 (85 C. C. A. 343, 19 L. R. A. (N. S.) 1206).

Nothing of similar import was given by the court in the charge to the jury which is here set down in full:

"You have been here for some little time. You have heard the testimony in this case and I will submit the case to you with the instruction that the jury are the exclusive judges of the facts. The defendant has requested me to give you certain instructions, numbered I to and including VI, each of which I decline to give. To the refusal to give each one of these instructions an exception is allowed. Nine of your number are sufficient to carry the verdict."

This disposes of all the assignments of error apparent in the bill of exceptions. Another matter discussed by both parties in their briefs and at the hearing was whether or not on the admitted facts the action was commenced in time. But for the fact that the question most likely will be urged again at the trial in the

Circuit Court, we might well ignore it on the record before us. In view of the attitude of the parties themselves, however, we will determine it. It is conceded in the reply that the plaintiff received a letter from the national secretary of the defendant dated January 16, 1915, stating that the directors could not entertain the plaintiff's claim and that the complaint herein was not filed until August 28, 1915. It is admitted in evidence also that the letter alluded to was received by the plaintiff not later than January 21, 1915. Six months from that date would expire July 21st of that year. The following excerpt from *Switchmen's Union of North America* v. *Colehouse,* 227 Ill. 561 (81 N. E. 696), sets forth a well-established canon for the construction of contracts of the sort before us:

"The laws and rules of the appellant are to be construed liberally in favor of appellee, so as not to defeat the object and purpose of the insurance or indemnity: *Healey* v. *Mutual Accident Assn.,* 133 Ill. 556 (25 N. E. 52, 23 Am. St. Rep. 637, 9 L. R. A. 371). Where it is sought to narrow the range of liability by insurance companies or societies, equivocal expressions are to be interpreted most strongly against the company: *Commercial Ins. Co.* v. *Robinson,* 64 Ill. 265 (16 Am. Rep. 557). 'The language of the policy, particularly in determining whether the liability is limited, is always to be strictly construed against the insurer': *Queen Ins. Co.* v. *Dearborn Sav. etc. Assn.,* 175 Ill. 115 (51 N. E. 717). The language and arrangement of the clauses of Section 16 are the language and arrangement of appellant, and in such cases it was held, in *Union Mutual Accident Assn.* v. *Frohard,* 134 Ill. 228 (25 N. E. 642, 23 Am. St. Rep. 664, 10 L. R. A. 383), that the interpretation must be most strongly against appellant; that the language used should be construed, according to its common and literal meaning, in favor of the assured. In *Forest City Ins. Co.* v. *Hardesty,* 182 Ill. 39 (55 N. E. 139, 74 Am. St. Rep. 161), it was

held that, where the contract of insurance is so framed as to leave room for construction, that construction should be adopted which will not impair the indemnity, and, if a clause in a policy is susceptible of two interpretations, courts will adopt the one which is most favorable to the assured, in order to indemnify him for the loss sustained. That case was cited and quoted from with approval in *Terwilliger* v. *National Masonic Accident Assn.*, 197 Ill. 9 (63 N. E. 1034)."

All parts of an instrument must be construed so as to make them harmonious and effectual if possible. It is required by Section 7 of Article IX of the defendant's constitution that all claims for benefits or indemnity must be presented to the national secretary of the association and that "such claims are not divisible and must be presented after the total recovery of the member." The possible time limit of reimbursement for total disability is one hundred and four consecutive weeks or two years, according to Section 3 of that article. We have in mandatory language the requirement that the claim must be presented after the total recovery of the member, which must mean, subject to the two-year limitation, that it cannot be presented before the member recovers. Reduced to its lowest terms it is in effect stated that no claim can exist until the recovery of the member. Giving these provisions effect in connection with Section 9 forbidding any action against the defendant unless commenced within six months after the refusal of the association to pay the same it is plain that the limitation must be held to run from the time when the defendant refuses to pay a claim which has been presented after the member has regained his health. The plaintiff had a right to recover for a period of disability amounting possibly to two years. To approve the contention of the defendant would be to hold that immediately on the happen-

ing of the accident it might renounce liability thereafter to accrue and thus reduce the two-year period to six months.

Its refusal to pay cannot be countenanced where it has the effect to violate or curtail the rights of the insured defined in other provisions of the contract. It is not by the mark to say that he could have commenced his action prior to July 21st, and then by supplemental complaints brought up the remainder of his demand for consideration, for it is expressly stipulated that claims are not divisible and in mandatory language the plaintiff was required to make presentation not before but after, he had regained his health.

There is an apparent conflict of authority between the precedents on the matter of conventional limitations in policies of insurance. One class holds that the time restriction prescribed in the policies must be so construed that it may be augmented by an additional provision to the effect that actions shall not be commenced until the expiration of a given period after the proofs of loss are submitted. Instances are cases like: *Hogl* v. *Aachen & Munich Ins. Co.,* 65 W. Va. 437 (64 S. E. 441, 131 Am. St. Rep. 972); *Stewart* v. *National Council Knights and Ladies of Security,* 125 Minn. 512 (147 N. W. 651); *Pacific Mutual Life Ins. Co.* v. *Adams,* 27 Okl. 496 (112 Pac. 1026). Others construe strictly the clause providing that no action shall be commenced after the period beginning with the happening of the fire or the death of the insured or the event causing the accident. Among cases apparently of the latter sort is *Egan* v. *Oakland Home Ins. Co.,* 29 Or. 403 (42 Pac. 990, 54 Am. St. Rep. 798), which holds that the limitation of six months from the date of the fire will be enforced though the policy said that the loss should not be payable until ninety days after furnishing said

proof. Other cases cited in the defendant's brief are *Harvey* v. *Fidelity & Casualty Co.*, 200 Fed. 925 (119 C. C. A. 221); *Tebbets* v. *Fidelity & Casualty Co.*, 155 Cal. 137 (99 Pac. 501); *Paul* v. *Fidelity & Casualty Co.*, 186 Mass. 413 (71 N. E. 801, 104 Am. St. Rep. 594); *Lowe* v. *United States Mutual Acc. Assn.*, 115 N. C. 18 (20 S. E. 169); *Law* v. *New England Mutual Acc. Assn.*, 94 Mich. 266 (53 N. W. 1104); *Moest* v. *Continental Casualty Co.*, 55 Misc. Rep. 128 (104 N. Y. Supp. 553). In most of these decisions, particularly *Egan* v. *Oakland Ins. Co.*, the injury for which indemnity was sought had fully passed, as in the *Egan Case*, a fire, and the cause of action had entirely accrued, while in the matter before us the claim was yet in process of development.

In the precedents cited it was possible that the casualty should happen, the damage fully accrue, the notice thereof be given, and proof of loss submitted, all well within the conventional period of limitation. But, as we have seen, in the present case the two-year possibility of the continuance of the sickness cannot be compressed within the six months' limitation. Again, in most of the cases relied upon as precedents, the limitation is inaugurated by a happening either beyond the control of both parties or within that of the claimant so that good reason exists for restricting the time within which he may sue. In brief, we are impelled to the conclusion that unless it cannot be avoided, that construction will not be placed upon the contract which will enable one party in its discretion to destroy or abridge a plain right of the other under the same contract. We are of the opinion, therefore, that under the admitted facts the action was commenced in time.

The conclusion of the whole matter is that the judgment of the Circuit Court in granting a new trial must be affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS, concur.

MR. JUSTICE MCCAMANT took no part in the consideration of this case.

Argued December 12, 1917, affirmed January 22, 1918.

BLEYTHING *v.* BLEYTHING.

(170 Pac. 305.)

Divorce—Grounds—Mutual Quarreling.

1. Decree for defendant wife in divorce suit will be affirmed; the evidence as to her conduct showing no more than the childish bickerings of two young people, avoidable by mutual forbearance and self-control.

[As to degree of proof required to establish cause for divorce, see note in Ann. Cas. 1913B, 1240.]

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is a suit by Wallace M. Bleything against Maude E. Bleything for divorce. There was a trial, findings and decree for defendant, and plaintiff appeals. Affirmed.

For appellant there was a brief over the names of *Miss Lida M. O'Bryon* and *Mr. George C. Brownell,* with an oral argument by *Miss O'Bryon.*

For respondent there was a brief and an oral argument by *Mr. Henry M. Esterly.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. There are no new questions of law raised upon this appeal, and to discuss the evidence would only be to recount the childish bickerings of two young people who, by the exercise of mutual forbearance and self-control, could have lived pleasantly together. The evidence does not convince us that defendant's conduct has been such as to entitle plaintiff to a decree, therefore the decree of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE BURNETT, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued January 8, reversed and remanded January 22, 1918.

MULTNOMAH COUNTY *v.* UNITED STATES FIDELITY & GUARANTY CO.*

(170 Pac. 525.)

Counties—Contract for Work—Bond—Statute.

1. Section 6266, L. O. L., requiring anyone contracting with the state, a municipality, county, or school district for prosecution of any work to give the usual penal bond, with the additional obligations that he make payments to all supplying him labor or material for any prosecution of the work, is not limited to what is incorporated into the work, but concerns every approximate relation of the contractor to that which he has contracted to do.

Highways—Contract for Work—Bond—Use of Engine—Compensation.

2. The bond of a contractor with a county for improving a highway, who was to furnish all material, tools, and equipment and labor, conditioned that he shall pay all subcontractors and laborers, materialmen, and all persons who shall supply laborers or subcontractors with materials or supplies for carrying on the work, covers compensation to the owner for the use of an engine hired by a subcontractor for work in grading.

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*On nature of labor and material which will support an action upon a contractor's bond, see notes in 43 **L. R. A. (N. S.)** 162; **L. R. A.** 1915F, 951. REPORTER.

Highways—Contract for Work—Bond—"Labor and Material"—Use of Engine.

3. Though the use of an engine is not strictly "labor and material," a bond for payment of which Section 6266, L. O. L., requires a county to exact of a contractor for work, a bond taken broad enough to cover compensation therefor is valid.

[As to right of one furnishing labor or material to sue on bond given by contractor to property owner, see note in Ann. Cas. 1916A, 754.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by the county of Multnomah for the use and benefit of L. H. McMahan upon a contract and bond executed by the Pacific Bridge Company, a corporation, and its surety. The complaint alleges in substance the following facts:

On June 21, 1915, Multnomah County entered into a contract with the defendant Pacific Bridge Company for the improvement of a portion of Columbia River Highway, namely, section D from the east end of Oneonta Bridge to the easterly line of the county. The contract and bond are set out in the complaint as exhibits. By the material provisions of the contract the construction company specifically agreed "to furnish all material, tools and equipment and all labor necessary to complete the above-described work strictly in accordance with said plans, specifications and schedule of rates," and before the contract became effective to furnish the county with a bond providing for the faithful performance of the agreement. The contractor agreed "to promptly, as due, make payments to all persons supplying" him with labor or material for the prosecution of the work provided for. Provision was made granting a right of action to persons furnishing material, labor and supplies to the contract company, who were not paid, as follows:

"The contractor further agrees that any person who supplied labor or material for the prosecution of any work provided for under this contract is hereby authorized to institute an action against said contractor or his sureties on his own relation in the name of the county, and to prosecute the same to final judgment for his own use and benefit. The contractor further agrees that all the provisions of the laws of the State of Oregon, applicable to the protection of subcontractors, materialmen and laborers engaged in carrying out the terms of this contract, are hereby made a part of this contract whether expressly incorporated herein or not."

The construction company filed a bond with the county in accordance with the contract and Section 6266, L. O. L., with the defendant United States Fidelity & Guaranty Company as surety. After reciting the contract between Multnomah County and the Pacific Bridge Company, the bond provides:

"Now, therefore, if the said principal herein * * shall faithfully and truly observe and comply with the terms, conditions and provisions of the said contract, in all respects, and shall well and truly and fully do and perform all and singular the covenants, conditions, guaranties, matters and things by it agreed, covenanted and undertaken to be performed under said contract, plans and specifications, upon the terms proposed therein, * * and shall indemnify and save harmless the county of Multnomah, * * and shall promptly pay all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such laborers, mechanics or subcontractors, with materials, supplies or provisions for carrying on such work, all just debts, dues, and demands incurred in the performance of such work, * * then this obligation to be void; otherwise to remain in full force and effect."

It will be seen that the contract and bond embraced all the conditions mentioned in the statute, and some specifications in excess of the statutory requirements.

After setting forth the organization of the county, the incorporation of the construction company and the United States Fidelity & Guaranty Company and the contract and bond, plaintiff's complaint proceeds to allege as follows: The Pacific Bridge Company commenced the construction of the improvement and during the course thereof entered into an agreement with the defendant, T. A. Sweeney, for the grading of the highway. In performing this work he used a caterpillar engine which he hired from L. H. McMahan whom he promised and agreed to pay the sum of $10 per day for the use thereof. Between June 21, 1915, and October 24th of that year Sweeney had the use of the caterpillar engine for work on the improvement for a period of 64 days, making an aggregate total of $640 due therefor, no part of which has been paid except $10 and $210 expended in making renewals and repairs on the engine, leaving a balance of $420 unpaid. Prior to the commencement of the action L. H. McMahan made application to the county of Multnomah by affidavit for a certified copy of the bond and contract of the defendant Pacific Bridge Company and was furnished the same. The defendants filed separate demurrers to the complaint upon the ground that that pleading did not state facts sufficient to constitute a cause of action. The demurrer of defendant T. A. Sweeney was on the further ground that there is no basis for the contractual relation set forth in the complaint between himself and the plaintiff. The respective demurrers were sustained by the court and plaintiff having refused to plead further judgment was entered in favor of the several defendants. Plaintiff appeals. REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. William P. Lord* and *Mr. Arthur I. Moulton*, with an oral argument by *Mr. Lord.*

For respondents, United States Fidelity & Guaranty Co. and The Pacific Bridge Co., there was a brief over the names of *Mr. M. H. Clark* and *Mr. A. E. Clark*, with an oral argument by *Mr. M. H. Clark.*

For respondent, T. A. Sweeney, there was a brief and an oral argument by *Mr. Thomas Mannix.*

MR. JUSTICE BEAN delivered the opinion of the court.

1. In 1903, Laws of 1903, p. 256 (Section 6266, L. O. L.), the legislature enacted the following:

"Hereafter any person or persons, firm or corporation, entering into a formal contract with the State of Oregon, or any municipality, county, or school district within said state, for the construction of any buildings, or the prosecution and completion of any work, or for repairs upon any building or work, shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts."

The act provides that any person or persons who so furnish labor or material may obtain a copy of the contract and bond, and that such person

"shall have a right of action, and shall be authorized to bring suit in the name of the State of Oregon, or any county, municipality, or school district within such state for his or their use and benefit against said contractor and sureties."

This act was amended in 1913, but not so as to change the provisions above referred to.

The position taken by the defendants is that the payment for the use of the caterpillar engine is not provided for in the contract and bond under the terms of the statute. In the expression of the statute it is quite likely that the lawmakers to a certain extent had in contemplation the various lien statutes providing for liens on buildings and other property both real and personal for labor and materials. However, the enactment under consideration has a different purport and broader meaning than the ordinary lien statutes; therefore, the construction of the latter affords but little assistance in arriving at the intent of the former. The lien statutes have usually been strictly held to cover only what is incorporated into the building or property against which the lien is claimed. Take for instance our mechanic's lien statute, Section 7416, L. O. L., which provides in part that

"a person performing labor upon or furnishing material, or transporting or hauling any material of any kind to be used in the construction, alteration, or repair, either in whole or in part, of any building"

shall have a lien upon the same. Such lien statutes obviously cover only what goes into the building or structure and adds to the value of the same.

In *American Surety Co.* v. *Lawrenceville Cement Co.,* 110 Fed. 717, 721, Judge PUTNAM states:

"However, this principle of discrimination is so strongly entrenched in the practical rules properly applicable to the construction of this statute that it needs no further exposition. It has, however, no necessary relation to repairs of an incidental and comparatively inexpensive character, made on the plant during the progress of the work, representing only the ordinary wear and tear or the equivalent thereof. Such repairs, under some circumstances, are within

the purview of the statute, and are not always excluded by any rules of construction which we must apply to it."

Even this underlying equity which requires these lien statutes to be so limited in their application is not applied with absolute strictness; for instance, where a bill of lumber is sold to one erecting a building no distinction is made between the portions of such material which are actually incorporated into the parts of the buildings and those which are used in erecting temporary floors and stagings necessary to aid in the construction. When the Congress of the United States enacted the statute, from which the one under consideration providing for giving the bond in question was copied, it used a much broader expression than is employed in the lien statutes. Our law uses the following language:

"Shall promptly make payments to all persons supplying him or them labor or materials for *any prosecution* of the work, provided for in such contracts."

As declared by Judge PUTNAM in *American Surety Co.* v. *Lawrenceville Cement Co.,* 110 Fed. 717, 721, "the statute in question concerns every approximate relation of the contractor to that which he has contracted to do."

2. In the present case the act and the bond are susceptible of a more liberal construction than the lien statutes. Under the law and the plain language of the bond all indebtedness incurred for labor and material used in the prosecution of the work contracted to be performed is thereby protected. The grading of the highway was an important part of the construction. If Mr. Sweeney had owned the engine as a part of his construction outfit and had used the same in the prosecution of the work in the same way he did after

hiring the machine, there could have been no question but that a fair compensation for the wear and deterioration of the instrumentality would have been protected by the bond under the law. The making of the contract with another for the use of the engine in moving the dirt and material in the prosecution of the work of making the grade does not change the substance of the transaction so that the reasonable expense therefor would not come within the provisions of the bond. On the other hand, such compensation which takes the place of the necessary wear and incidental repairs of the machine (see *American Surety Co.* v. *Lawrenceville Cement Co.,* 110 Fed. 717, 721) comes directly within the protection of the letter and spirit of the bond. The use of the caterpillar engine having been supplied to the contractor through the medium of the subcontractor Sweeney for the prosecution of the work provided for in the contract, and the Pacific Bridge Company having given a bond with surety to pay for the same and having failed to do so, as alleged in the complaint, the demurrers to the complaint should have been overruled: See *United States* v. *American Surety Co.,* 200 U. S. 197 (50 L. Ed. 437, 26 Sup. Ct. Rep. 168); *School Dist. No. 30* v. *Alameda Const. Co., ante,* p. 132, 169 Pac. 507, 788; *School Dist. No. 45* v. *Hallock,* 86 Or. 687 (169 Pac. 130); *Portland* v. *New England Casualty Co.,* 78 Or. 195 (152 Pac. 253); *Columbia County* v. *Consolidated Contract Co.,* 83 Or. 251 (153 Pac. 438). In *Grants Pass Trust Co.* v. *Enterprise Min. Co.,* 58 Or. 174, 177 (113 Pac. 859, 34 L. R. A. (N. S.) 395, 1 Water & Min. Cas. 412), a suit to enforce a miner's lien allowed by Section 7444, L. O. L., to any person furnishing materials or supplies for the working or development of any mine, it was held in an elaborate opinion by Mr. Justice

MOORE that electricity furnished to a mine for illumination or power constituted "supplies" within the meaning of the law.

The line of demarcation must be drawn between labor and material furnished a contractor which are covered by such a bond and those without the pale of such an undertaking by taking into consideration the service and material in the particular case.

In *National Surety Co.* v. *United States,* 228 Fed. 577, 578, the syllabus says:

"Supplies furnished a contractor with the United States, which were specifically intended for current consumption directly on the work, such as drills and material for drills used in drilling machines, and made to be used up currently, and in fact used up in direct and immediate contact with rock removed as part of the contract, were covered by the contractor's bond; the removal of such rock being a part of the 'construction of the work.' "

By the explicit terms of the contract the use of the engine referred to and that of other similar appliances was made a part of the contract price. According to the averments of the complaint the energy of the instrument entered directly into the construction of the highway just as effectively as though it had been owned by the contractor or subcontractor and evidently served, to a large extent at least, as a substitute for manual labor. There is no chance for a double allowance for the service claimed.

This case is somewhat analogous to and within the reasoning of the so-called powder cases and coal cases: See *Schaghticoke Powder Co.* v. *Greenwich etc. R. Co.,* 183 N. Y. 306 (76 N. E. 153, 111 Am. St. Rep. 751, 5 Ann. Cas. 443, 2 L. R. A. (N. S.) 288), which is a lien case, and *City Trust etc. Surety Co.* v. *United States,* 147 Fed. 155, (77 C. C. A. 397). The statute

should not be extended to include the use of material not intended to be protected by it or by the contract and bond, such as claims for the purchase of an engine, hoisting apparatus, or the like. In the case of *United States Fidelity & Guaranty Co.* v. *Bartlett,* 231 U. S. 237 (58 L. Ed. 200, 34 Sup. Ct. Rep. 88), the contractors were to build a breakwater. They owned a quarry which, in order to perform their contracts, it was necessary to open to get out the stone, transport it and dump it into the water. The question involved was the labor cost of quarrying and hauling the materials. The court held that the whole of this was labor performed on the contract.

3. According to the strict legal definition of the term "labor and material" the use of the engine would not be embraced therein: 2 Wds. & Phrases (2d Series), p. 1321. There can be no question but that the services of the machine in the actual grading of the highway, as alleged in the complaint, is covered by the language of the contract and bond. We see no reason why the parties negotiating the transaction may not follow their own wills as long as their minds coincide perfectly, in stipulating as to matters which are often the subject of controversy, as shown by the opinions in the cases above cited; and plainly say by their written instrument what shall be included in the contract and bond, considered as labor and material and paid for by the contractor and his surety, and so avoid disputes between those interested in the construction of the public improvement.

Statutes like the one in question have usually been and should be given a liberal construction so as to carry out the legislative intent and effect the purpose contemplated by the law: *United States* v. *American Surety Co.,* 200 U. S. 197 (50 L. Ed. 437, 26 Sup. Ct.

Rep. 168); *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed. 717; *Portland* v. *New England Casualty Co.*, 78 Or. 195 (152 Pac. 253); *Ulster County Sav. Inst.* v. *Young*, 161 N. Y. 23 (55 N. E. 483); *Hurley-Mason Co.* v. *American Bonding Co.*, 79 Wash. 564, (140 Pac. 575). A public corporation authorized by law to require bonds of contractors for public work to secure the payment of labor and materials is not restricted by the statute from taking other or additional measures and provisions in excess of those specified by the statute in order to protect those who aid in the public work: Brandt on Suretyship (3 ed.), § 31; 1 Elliott on Roads & Streets (3 ed.), § 646; 2 Dillon on Mun. Corp. (5 ed.), § 830; 19 R. C. L., 1078, § 364.

In the case at bar, if the work mentioned had been performed by the exercise of the muscles of laborers there would have been no question but that the same was protected by the statute. With the hard surface road pavement coming into vogue, new methods of road construction utilizing high power machinery, equipment and appliances have superseded the old mode of construction with pick and shovel. It seems to us that it was intended by the enactment, as expressed by the lawmakers, that the construction of an improvement, such as a paved highway, should be paid for; that in order to carry out the intent of the law it was the right and duty of the county officials to require a bond protecting the payment of obligations incurred for labor or material approximating the construction work. Plainly the contract and bond in question made such provisions and nominated the item sued for. The language of the statute indicates that the lawmakers had in mind the modern conditions prevailing at the time of the enactment. By the recitation in their contract and bond the parties to the

transaction have to a certain extent placed their own construction upon the law, assented thereto and made their binding agreement in conformity therewith. Within the meaning of the contract and bond, which are in accordance with the spirit of the statute, the service of the engine should be deemed "labor and material." We are guided by the averments of the complaint. If the claim for the service of the machine was not reasonable or if the instrumentality was not used as alleged, that should be explained in an appropriate manner.

The judgment of the lower court sustaining the demurrers to the complaint is reversed and the cause will be remanded for further proceedings not inconsistent herewith. REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued January 11, affirmed January 22, 1918.

JACKMAN v. NORTHWESTERN TRUST CO.*

(170 Pac. 304.)

Vendor and Purchaser—Rescission—Mistake.

1. If an innocent and mutual mistake was made by the defendant and plaintiff, the mistake being without negligence or fault on the part of plaintiff, and so material that if the truth had been known to the parties, the agreement for the sale of land would not have been entered into, that is sufficient to justify a rescission of the contract.

[As to canceling or correcting writings because of mistake, see note in 117 Am. St. Rep. 227.]

Fraud—Reckless Misrepresentations.

2. Misrepresentations of material matters recklessly made, as of one's own knowledge, without in fact knowing whether they are

*On right of purchaser of land to rely upon representation of seller as to boundaries, see note in 14 L. R. A. (N. S.) 1210. REPORTER.

true or not, render the maker liable to one who relies and acts thereon to his injury.

Vendor and Purchaser—Rescission—Mistake.

3. Where officer of vendor corporation went with plaintiff's agent and pointed out certain land as included in the tract to be sold, and such representation induced the sale, and was relied on, when such land was not included, the purchaser could rescind.

From Polk: HARRY H. BELT, Judge.

This is a suit by Edna R. Jackman against the Northwestern Trust Company, a corporation, to rescind a contract for the purchase of land. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit to rescind an executory contract for the sale of 163 acres of land in Polk County, Oregon, to recover the sums of money paid thereon and also the amount expended in making permanent improvements on the premises. The trial court passed a decree rescinding the contract and awarding plaintiff the relief prayed for. Defendant appeals.

The following statement of facts appears by the complaint: On November 16, 1911, defendant acquired title to certain property which it induced the plaintiff to purchase on March 1, 1915, for the sum of $3,000 by making false and mistaken representations concerning its boundary lines and the location of the buildings and a spring of water thereon. Plaintiff paid defendant $1,075 on the purchase price. On March 31, 1915, she and her husband and their children moved on the premises and remained there until about the first of August of that year. She performed work and labor, furnished materials, and expended money for the improvement of the land of the reasonable value of $247.25.

In its answer defendant denies absolutely all the material allegations set forth in the complaint and alleges as a separate defense that on August 20, 1913, plaintiff and defendant entered into an executory contract for the purchase and sale of 15.11 acres of land in Loganville, Marion County, Oregon; that plaintiff paid upon said contract at divers times the sum of $525; that on September 29th of the same year defendant and plaintiff's husband, W. T. Jackman, entered into a further contract whereby the latter agreed to purchase of defendant an additional 14.42 acres of land in Loganville for the sum of $1,875 to be paid for by constructing a road across Loganville for defendant; that subsequently during the spring of 1915 plaintiff became dissatisfied with the properties and importuned the defendant to exchange the contracts for said properties, and equities created thereby, for the 163 acres in Polk County; that on March 14, 1915, at plaintiff's request and in consideration of the payment of the sum of $525 on account of the contract of purchase of the 15.11 acre tract, plaintiff and defendant entered into the agreement which plaintiff seeks to annul in this litigation without any representations being made by the defendant in regard to the physical location or aspect of the Polk County property, save as to acreage.

A reply was filed putting in issue the gist of the answer except as to the transfer. AFFIRMED.

For appellant there was a brief over the names of *Mr. Everil M. Page* and *Messrs. McNary & McNary*, with an oral argument by *Mr. Page.*

For respondent there was a brief with oral arguments by *Mr. Oscar Hayter* and *Mr. E. K. Piasecki.*

MR. JUSTICE BEAN delivered the opinion of the court.

The evidence in the case supports the allegations of the complaint in the main; and stated in a general way shows that a short time before making the contract in question C. F. Reid, the president of the defendant, went with the plaintiff's husband, who acted in her behalf, to visit the land which is situated near Falls City; that neither was acquainted with the corners or lines thereof, but that Mr. Reid indicated that the buildings were located about in the center, according to which about 40 or more acres of practically level land which could be easily cleared and made good tillable soil would be embraced in the property; that there was a good spring thereon with a beautiful site for building purposes; that the deal was closed while upon the train and the application written; that after plaintiff moved upon the premises she cleared about 2½ acres and was informed by the road supervisor that a portion of that which she had cleared was not upon her premises, whereupon she had a survey of the lines run and ascertained that neither the spring nor the 40-acre tract which her husband examined with Mr. Reid were in her purchase. The land found within the lines of that purchased being rough, with a deep canyon, but little of it susceptible of cultivation and of small value, estimated at from four to six dollars an acre, she demanded a rescission of the contract and tendered the written contract to defendant.

1, 2. It is contended for defendant that its president had no knowledge of the boundaries of the land and that plaintiff's husband relied upon his own examination. It is clearly shown, however, that Mr. Reid led Mr. Jackman to believe that the buildings were near the

center of the premises and that the tract of about 40 acres which was somewhat level was a portion of the land to be sold. It is plain that except for the misrepresentations which were made, whether intentional or otherwise, the contract would not have been made. There was no meeting of the minds as to the actual land embraced in the contract. If an innocent and mutual mistake was made by the defendant and plaintiff, the mistake being without negligence or fault on the part of plaintiff and so material that if the truth had been known to the parties, the agreement would not have been entered into, that is sufficient to justify a rescission of the contract for the sale of the land: *McCrea* v. *Hinkson,* 65 Or. 132 (131 Pac. 1025); *Bigham* v. *Madison,* 103 Tenn. 358 (52 S. W. 1074, 47 L. R. A. 267, 269); *Duncan* v. *N. Y. Life,* 138 N. Y. 88 (33 N. E. 730, 20 L. R. A. 386); *Hosleton* v. *Dickinson,* 51 Iowa, 244 (1 N. W. 550). The representations made to plaintiff were such as would have deceived a person of ordinary prudence. It appears that plaintiff could have reasonably believed the same to be true: *Dunning* v. *Cresson,* 6 Or. 241; *Wheelwright* v. *Vanderbilt,* 69 Or. 326 (138 Pac. 857). Misrepresentations of material matters recklessly made, as of one's own knowledge, without in fact knowing whether they are true or not, render the maker liable to one who relies and acts thereon to his injury: *Cawston* v. *Sturgis,* 29 Or. 331 (43 Pac. 656); *Robertson* v. *Frey,* 72 Or. 599 (144 Pac. 128). If the representations of defendant were false, were of material facts and relied upon by the plaintiff, as the evidence shows is the case, in this suit for a rescission it is immaterial whether the representations were knowingly false or occasioned by a mutual mistake. They animated and controlled the conduct of the

party: *Joplin* v. *Nunnelly,* 67 Or. 566, 574 (134 Pac. 1177); *Spence* v. *Hull,* 75 Or. 267, 274 (146 Pac. 95); *Jeffreys* v. *Weekly,* 81 Or. 140 (158 Pac. 522); 39 Cyc., p. 1249.

3. It seems that while Mr. Reid did not know or pretend to know the exact locations of the lines and corners of the land, he did point out that which was not embraced in the contract upon which the spring was located, and induced a reliance thereon. He was under an obligation in so far as he indicated the location of the property to point it out correctly and he has no right to make a mistake in so doing and expect to escape liability therefor: *Bird* v. *Kleiner,* 41 Wis. 134; *Freeman* v. *Gloyd,* 43 Wash. 607 (86 Pac. 1051).

It is contended on defendant's behalf that only $525, the amount which had been paid upon the Loganville tract of Mrs. Jackman, was transferred and credited upon the contract in question. As to the other contract for Loganville property made by Mr. Jackman the defendant contends that it paid him $950 and was to pay him $50 more upon the completion of the road in full satisfaction therefor and that the contract was thereby canceled. This is disputed by Mr. Jackman and by the written contract in question and also by the statement or pass-book given by the defendant to plaintiff showing the payment of $1,075 marked "trans.," which is explained to mean that this amount was transferred from the Loganville contracts. It is in evidence that Mr. Jackman assisted in the sale of the Loganville tracts and that defendant would not release him from the Loganville contract until such sale was made, making the deal in question a four-cornered one, when the purchaser transferred to defendant a Portland lot. It appears that there was a discount from the amount paid by the Jackmans on the Loganville

contracts in cash and road work of $350 or $400, but the evidence does not support the defendant's claim that there was a discount of $875, which would be the balance due upon the road work deducting the amount paid therefor, $950, and $50 for work not done. Mr. Reid states:

"I believe Mr. Jackman discounted—you see he had made the arrangements and received deposit on one—his property, I believe he discounted it approximately $500 in making the sale."

It therefore appears that the amount paid in labor on the W. T. Jackman contract for the Loganville tract did enter into the Falls City property contract in question. The trial judge heard and saw the witnesses upon the stand and his findings in regard to the facts should be given great weight. The decree of the lower court is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Submitted on brief January 10, affirmed January 22, 1918.

FARGO *v.* DICKOVER.*

(170 Pac. 289.)

Judgment—Suit on Foreign Judgment—Limitations.

1. Under Section 3, L. O. L., providing that actions at law shall only be commenced within the periods prescribed after the cause of action shall have accrued, except where a different limitation is prescribed, Section 5 barring actions upon judgment or decrees of any court of the United States or of any state or territory in ten years, and Section 16 providing that if when the cause of action shall accrue against any person who shall be out of the state such action

*On the question of applicability to nonresidents of provision suspending limitations against defendant who is out of the state, until his return, see note in 25 L. R. A. (N. S.) 24. REPORTER.

may be commenced within the term herein limited after the return of such person into the state, etc., although the judgment defendants had resided within the state less than ten years, and the action on the judgment was not barred in the state where the judgment was rendered, it would be barred here where more than ten years had expired since the judgment was rendered, Section 16 being inapplicable to a nonresident.

[As to when the statute of limitations begins to run against an action on a judgment, see note in Ann. Cas. 1916C, 625.]

From Multnomah: ROBERT G. MORROW, Judge.

This is an action by J. W. Fargo against Joseph B. Dickover and Josiah C. Dickover. From a judgment in favor of defendants, plaintiff appealed. Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

In Banc. Statement by MR. JUSTICE MCCAMANT.

This action was brought in the Circuit Court for Multnomah County June 15, 1915. Plaintiff pleads that he is assignee of a judgment recovered against defendants November 26, 1895, in a court of general jurisdiction in South Dakota; that under the law of that state an action on such judgment may be brought at any time within twenty years from the date of its rendition; that defendants have resided in Oregon less than ten years. Defendants demurred on the ground that the action was barred by the statute of limitations. This demurrer was sustained and judgment was entered in favor of defendants. Plaintiff appeals.

AFFIRMED.

For appellant there was a brief submitted by *Messrs. Clark, Geneste & Harrison.*

For respondents there was a brief over the name of *Mr. F. H. Whitfield.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. The questions raised on this appeal involve the construction of our statute of limitations. Sections 3 and 5, L. O. L., are in part as follows:

"§ 3. Actions at law shall only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; except where, in special cases, a different limitation is prescribed by statute."

"§ 5. Within ten years,—

"1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States."

If there be nothing to defeat the bar of the above statute, it is clear that the lower court was right in sustaining the demurrer. The only contention open to plaintiff is that the effect of this statute is modified by Section 16, L. O. L.:

"If, when the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited, after the return of such person into the state, or the time of his concealment; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action."

It has been held three times that this latter statute is inapplicable to nonresidents: *McCormick* v. *Blanchard,* 7 Or. 232; *Crane* v. *Jones,* 24 Or. 419 (33 Pac. 869); *Van Santvoord* v. *Roethler,* 35 Or. 250 (57 Pac. 628, 76 Am. St. Rep. 472). The last of these cases was an action on a judgment secured in a court of another state; the case is squarely in point on the facts and

is decisive of the controversy unless it has been overruled.

The only Oregon case relied on by plaintiff is *Jamieson* v. *Potts,* 55 Or. 292 (105 Pac. 93, 25 L. R. A. (N. S.) 24). The defendant in that case was a nonresident who executed two promissory notes within this state and departed from Oregon before their maturity. He was without the state when the cause of action accrued and resided without the state continuously until the action was brought. The payee of the notes and plaintiff to whom they were indorsed at all times resided in Oregon. The action was brought thirteen years after the maturity of the notes. Under these facts it was held that the case fell within the protection of Section 16, L. O. L., and that the statute of limitations did not bar the action. Mr. Justice SLATER said:

"Defendant was in the state when he executed and delivered each of the notes to a resident thereof. It is therefore a domestic, and not a foreign contract. He departed from the state, and after the cause of action accrued, he came again into the state, although for a transient and temporary purpose. It can therefore be said that he 'returned' to the state."

This language manifests an intention to distinguish rather than to overrule.

While other portions of the opinion cite with approval authorities which are out of harmony with the rules announced in *McCormick* v. *Blanchard,* 7 Or. 232, *Crane* v. *Jones,* 24 Or. 419 (33 Pac. 869), and *Van Santvoord* v. *Roethler,* 35 Or. 250 (57 Pac. 628, 76 Am. St. Rep. 472), we do not think that *Jamieson* v. *Potts* should be treated as overruling these cases. The case of *Jamieson* v. *Potts* will be followed whenever a similar state of facts shall arise, but we still

hold that Section 16, L. O. L., is without application to a cause of action arising in another state between nonresidents of Oregon.

The Circuit Court did not err in sustaining the demurrer and the judgment is affirmed. AFFIRMED.

Argued December 19, 1917, affirmed January 22, 1918.

MORATA *v.* OREGON-WASH. R. & N. CO.*

(170 Pac. 291.)

Appeal and Error—Denial of Nonsuit—Review.

1. On assignments of error directed wholly to denial of defendant's motions for nonsuit and directed verdict, the only question is whether, viewing the evidence in the light most favorable to plaintiff, it warranted the judgment.

Master and Servant—Injury to Servant—Failure to Warn—Evidence.

2. In an action by a trackman for injuries based on defendant railroad's negligence in failing to give warning of approaching train, *held*, under evidence, that jury was authorized to infer that no whistle was sounded.

Master and Servant—Injury to Servant—Duty to Warn.

3. Where defendant railroad's employees saw plaintiff at work on a switch when the train was about a third of a mile away, it was their duty to sound the whistle or ring the bell, the weather being cold and windy, so that plaintiff had his cap pulled down over his ears.

Master and Servant—Injury to Servant—Contributory Negligence—Sufficiency of Evidence.

4. In an action by a trackman for injuries based on defendant railroad's negligence in failing to give warning of approach of train, *held*, under evidence, that jury was entitled to infer that plaintiff had no knowledge of the approach of the train prior to the accident.

Master and Servant—Injury to Servant—Federal Employers' Liability Act—Contributory Negligence.

5. Where the track on which plaintiff was working was used by defendant railroad in interstate commerce, plaintiff was within the protection of Act Cong. April 22, 1908, Chapter 149, Section 3, 35 Stat.

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*On duty of railroad company to warn track employees of approach of train or car, see comprehensive note in L. R. A. 1916F, 555. REPORTER.

66 (U. S. Comp. Stats. 1916, § 8659), and his contributory negligence would not bar recovery.

Master and Servant—Injury to Servant—Assumption of Risk—Custom.

6. Under Act Cong. April 22, 1908, Chapter 149, Section 4 (U. S. Comp. Stats. 1916, § 8660), as to assumption of risk, where a trackman working on a track used in interstate commerce was run down by a train which gave no warning, recovery could not be defeated on theory of assumption of risk in the absence of evidence of a custom, of which he had knowledge, to operate trains without giving warning.

[As to assumption of risk under Federal Employers' Liability Act, see note in **Ann. Cas.** 1915B, 481.]

From Multnomah: GEORGE N. DAVIS, Judge.

Action by Lorenzo Morata against the Oregon-Washington Railroad & Navigation Company, a corporation. From a verdict and judgment thereon in favor of plaintiff, defendant appealed. Affirmed.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action brought to recover damages for a personal injury sustained by plaintiff on December 31, 1915. At that time plaintiff had been in the employ of the track department of the defendant for approximately fifteen months. Prior to December 31st it had been snowing and early on the morning of that day plaintiff had been ordered to clean away the snow from a switch at the west end of the passing track at Bacon, a station in Union County between Union Junction and Telocasset. He began work a few minutes after 7 o'clock in the morning and was injured between 7:30 and 8. The wind was blowing from the east and the weather was cold. Plaintiff's cap partially covered his ears and may have impaired his hearing. In the performance of his work he was required to bend over and was facing westerly. While in this position a train consisting of a rotary snowplough, tender and caboose backing downhill ran into

him and caused the injuries of which he complains. Plaintiff testifies that when he was hurt he was standing with one foot on the end of the tie and the other foot on the ground. He testifies that he could have seen the train at a distance of half to three quarters of a mile from the place of the accident; that generally he was looking every few minutes. A light engine had passed in a westerly direction at about 7:15. Plaintiff testifies that he did not expect any other train in the same direction so soon thereafter, but that he had looked in an easterly direction from three to five minutes before he was hurt. Negligence is charged against the defendant based on its alleged failure to keep a lookout on the train and to give warning of its approach. The defendant pleads affirmatively contributory negligence and assumption of risk. Plaintiff recovered judgment in the court below. Defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. W. A. Robbins* and *Mr. Arthur C. Spencer,* with an oral argument by *Mr. Robbins.*

For respondent there was a brief and an oral argument by *Mr. Edward J. Brazell.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. The assignments of error are directed wholly to the denial of defendant's motions for a nonsuit and for a directed verdict. In speaking of a motion for a directed verdict, Mr. Justice WOLVERTON says, in *Stager* v. *Troy Laundry Co.,* 41 Or. 141, 143 (68 Pac. 405):

"Like a motion for a nonsuit, or a demurrer to the evidence, it admits everything to be true that the testi-

mony legally tends to prove, ascribing to every statement of fact in evidence absolute credence; so that if there is testimony in the case from which the jury can, by application of intelligent and reasonable deduction, fairly and legitimately infer the fact in issue, the jury are to determine the matter, notwithstanding other evidence may have been adduced in direct conflict therewith."

The foregoing principles have been many times affirmed by this court. The question to be decided is whether, viewing the testimony in the light of the above principles, we can say as a matter of law that the evidence fails to charge the defendant with negligence or that the evidence makes out one or both of the affirmative defenses set up in the answer.

There is no evidence whatever to sustain the charge that the defendant failed to maintain a lookout as the train in question approached the place where plaintiff was working. All the evidence is to the contrary.

The defendant's witnesses testify that the whistle was blown one or more times as the train approached plaintiff, and the defendant contends that no inference to the contrary is to be drawn from plaintiff's evidence. Plaintiff testified by the aid of an interpreter and his testimony therefore appears in the record in the third person. He testifies in part as follows:

"Q. Was any warning given of the approach of that train?

"A. No, sir,—he heard no warning at all,—the first train that went by,—that light engine blew a whistle,—and when he heard the whistle blown he just got away,—but this second one,—the only thing he remembers,—he got struck by this train and fell down,—and that is all he can remember,—and he don't remember anything else."

"Q. Did you see any part of the train that struck you?

"A. No, sir,—he didn't see nothing at all.

"Q. Is your hearing good?

"A. Yes, sir.

"Q. Can you hear a locomotive whistle when one is sounded?

"A. He says that just the same way that he heard the whistle of the first engine that went by just fifteen minutes before he could have heard this one if it had whistled.

"Q. Well, now, if you can hear this snow plow coming for six or eight yards, why didn't he hear it on this day?

"A. He says that if the engineer had blown a whistle he would have heard it about a mile or two miles away,—and that he would have gotten out of the way."

2, 3. The jury was entitled to infer from this evidence that the whistle was not blown: *Smith* v. *Southern Pacific Co.*, 58 Or. 22, 33 (113 Pac. 41, Ann. Cas. 1913A, 434). It appears unmistakably from the evidence that defendant's employees in charge of the train saw plaintiff when the train was distant about seventeen hundred feet from him. One, at least, of the defendant's employees saw that plaintiff was at work on the switch while the train was about a third of a mile away. Under these circumstances, and in view of the condition of the weather, we think it was the duty of those in charge of the train to sound the whistle or ring the bell: 2 Thompson on Negligence, § 1735; *Norfolk & W. R. Co.* v. *Earnest,* 229 U. S. 114, 118 (57 L. Ed. 1096, Ann. Cas. 1915C, 172, 33 Sup. Ct. Rep. 654); *Central R. Co.* v. *Colasurdo,* 192 Fed. 901, 902 (113 C. C. A. 379); *Louisville & N. R. Co.* v. *Johnson,* 161 Ky. 824 (171 S. W. 847, 849, 850); *Hardwick* v. *Wabash R. Co.*, 181 Mo. App. 156 (168 S. W. 328, 331). The defendant relies on this issue on *Aerkfetz* v. *Humphreys,* 145 U. S. 418, 420 (36 L. Ed. 758, 12 Sup.

Ct. Rep. 835), and *Riccio* v. *New York etc. R. Co.*, 189 Mass. 358 (75 N. E. 704); 19 American Negligence Reports, 277. The accidents involved in these two cases occurred in railway yards at Detroit, Michigan, and New Haven, Connecticut, respectively. Both were places where trains were constantly moving and Mr. Justice BREWER, in the first of these cases, says:

"The ringing of bells and the sounding of whistles of trains going and coming and switch-engines moving forwards and backwards would have simply tended to confusion."

The situation was manifestly different in the sparsely settled section of this state where plaintiff was hurt.

4. It is true, as contended by the defendant, that negligence cannot be predicated on the failure to sound the whistle or ring the bell if, notwithstanding such failure, the party to be warned knew of the approach of the train in time to save himself: *St. Louis I. M. & S. R. Co.* v. *Gibson* (Okl.), 150 Pac. 465. The jury in the case at bar was entitled to infer that plaintiff had no knowledge of the approach of the train prior to the accident. We think it is clear that plaintiff made out a case on the subject of the defendant's negligence sufficient to be submitted to the jury.

5. The defendant's argument in support of its contention that plaintiff was guilty of contributory negligence is a strong one and is supported by many authorities, but this contention cannot avail the defendant on this appeal. It is charged in the complaint and admitted by the answer that the track, on which plaintiff was working, was used by the defendant in interstate commerce. This circumstance brings plaintiff within the protection of the act of Congress approved April 22, 1908; 35 Stat., pt. I, p. 65; *Pedersen*

v. *Delaware, L. & W. R. Co.,* 229 U. S. 146, 151, 152 (57 L. Ed. 1125, Ann. Cas. 1914C, 153, 33 Sup. Ct. Rep. 648); *Central R. Co.* v. *Colasurdo,* 192 Fed. 901, 903 (113 C. C. A. 379); *Southern Ry. Co.* v. *Smith,* 205 Fed. 360, 361 (123 C. C. A. 488); *Anest* v. *Columbia etc. R. Co.,* 89 Wash. 609 (154 Pac. 1100). It is expressly provided by Section 3 of this act that contributory negligence shall not bar a recovery but shall go only in mitigation of damages; *Chadwick* v. *Oregon-Wash. R. & N. Co.,* 74 Or. 19, 25, 26 (144 Pac. 1165); *Pfeiffer* v. *Oregon-Washington R. & N. Co.,* 74 Or. 307, 321 (144 Pac. 762); *Norfolk & W. R. Co.* v. *Earnest,* 229 U. S. 114, 120 (57 L. Ed. 1096, Ann. Cas. 1914C, 172, 33 Sup. Ct. Rep. 654).

The assignments of error on which the defendant relies involve only the right of plaintiff to maintain the action, and however clear the showing of contributory negligence on the part of the plaintiff, this showing would not bar his right of recovery.

6. The fourth section of the act of Congress above referred to provides that the employee:

"Shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The inference to be drawn from the statute is that the defense of assumption of risk is still available to the defendant in actions brought under the statute, except in the cases specifically inhibited by the language above quoted, and this accords with the construction given by the federal courts: *Connelley* v. *Pennsylvania R. Co.,* 201 Fed. 54 (47 L. R. A. (N. S.) 867, 119 C. C. A. 392), 228 Fed. 322 (142 C. C. A. 614); *Central R. Co.* v. *Colasurdo,* 192 Fed. 901, 902 (113

C. C. A. 379); *McGovern* v. *Philadelphia & R. R. Co.*, 235 U. S. 389, 401, 402 (59 L. Ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. C. A. 67). Can it be said that plaintiff assumed the risk of injury by a train which gave no warning of its approach? The doctrine of assumption of risk has reference to a continuing dangerous condition of the place where the servant works or of the tools and appliances furnished him for his work. The doctrine is predicated on the knowledge of the servant and his presumed assent to the perilous conditions under which he is working: 18 R. C. L. 677, 678. As applied to the facts of this case, it may well be that plaintiff assumed the risk of being run down by trains of the defendant which were operated in the usual way.

If it had been shown that it was the custom of the defendant to operate its trains without giving warning to trackmen, it might well be argued that plaintiff in his fifteen months' service had received notice of this method of operating trains and assumed the risks incident thereto. But there is no evidence to that effect. Evidence offered as to the custom in the matter of sounding the whistle was excluded by the court on the defendant's objection. In the absence of such a showing plaintiff was entitled to depend upon the defendant to give warning of the approach of the train which injured him: 18 R. C. L. 712. This court has several times held that the servant does not assume risks of which he has neither knowledge nor notice: *Galvin* v. *Brown & McCabe,* 53 Or. 598, 611 (101 Pac. 671); *Richardson* v. *Klamath S. S. Co.,* 62 Or. 490, 496 (126 Pac. 24); *Pfeiffer* v. *Oregon-Washington R. & N. Co.,* 74 Or. 307, 319, 320, 326 (144 Pac. 762).

It cannot be held on this record that plaintiff as a matter of law assumed the risks incident to the oper-

ation of defendant's trains without the use of the whistle or the bell. Our conclusions in this respect are in harmony with those of the Supreme Court of the United States and of the Circuit Court of Appeals for the Second Circuit: *McGovern* v. *Philadelphia & R. R. Co.*, 235 U. S. 389, 401, 402 (59 L. Ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. C. A. 67); *Central R. Co.* v. *Colasurdo*, 192 Fed. 901, 902 (113 C. C. A. 379). The defendant relies on this question on *Connelley* v. *Pennsylvania Co.*, 201 Fed. 54 (47 L. R. A. (N. S.) 867, 119 C. C. A. 392), 228 Fed. 322 (142 C. C. A. 614). The accident out of which this case arose occurred just out of Broad Street Station, Philadelphia. Plaintiff's decedent at the time of the accident was at work on one of the many tracks of the Pennsylvania Railroad at a place where a locomotive was emitting steam. Trains were constantly passing and the position chosen by the deceased for doing his work was one of great and obvious peril. These circumstances differentiate that case from the case at bar.

We find no error and the judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued January 8, affirmed January 22, 1918.

COOK *v.* NOLAN.

(170 Pac. 306.)

Judgment—Conclusiveness—Matters Concluded.

1. Where in a former suit between the same parties it was decreed that defendants had no interest in the property involved, such decree is conclusive as to the interest of defendants in a subsequent suit to enjoin foreclosure of a mortgage given by one of the defendants.

[As to the conclusiveness of a judgment foreclosing a mortgage, see note in 18 **Am. St. Rep.** 790.]

From Multnomah: T. E. DUFFY, Judge.

This is a suit by Vincent Cook against Oak Nolan, A. E. Nolan, Annie E. Nolan, his wife, and Home Installment Company, a corporation, to enjoin the foreclosure of and to cancel a mortgage, and to quiet the title in plaintiff. From a decree in favor of plaintiff, defendants appeal. Affirmed.

For appellant there was a brief over the names of *Mr. B. J. Howland* and *Mr. Oak Nolan,* with an oral argument by *Mr. Howland.*

For respondents there was a brief over the names of *Mr. J. H. Middleton* and *Messrs. Clark, Skulason & Clark,* with an oral argument by *Mr. M. H. Clark.*

Department 2. Opinion PER CURIAM.

1. This suit involves the title to the same tract of land which was before this court in the case of *Nolan* v. *Cook,* 81 Or. 287 (159 Pac. 810). In that case it appeared that A. E. Nolan, the then plaintiff, and one of the defendants in the present case claimed title to the land now in controversy through quitclaim deeds from Keasey and others to Herbert A. Holmes, who conveyed to Oak Nolan, who conveyed the property

to Ross, who in turn conveyed to A. E. Nolan. It also appeared that the real party in interest was Oak Nolan, and that for reasons intimated in the opinion he procured the conveyances to be made in the names of the parties above recited, but that none of them had any beneficial interest in the property. The decree in that case is conclusive here upon all these parties. As to them it is conclusively settled that they had no interest in the property and that Cook was the owner thereof: *Robbins* v. *Chicago,* 4 Wall. (U. S.) 657 (18 L. Ed. 427); *Shoemake* v. *Finlayson,* 22 Wash. 12 (60 Pac. 50).

Previous to giving the mortgage in controversy Oak Nolan gave a mortgage upon the lands to one Nettie Jones, his sister, for the sum of $3,000, which mortgage he admits in his testimony here was without consideration and evidently given to complicate the title and embarrass plaintiff in any possible suit he might institute to clear it. Later he executed a mortgage for the sum of $2,500 to the defendant "Home Installment Company" which claims to be an innocent mortgagee for value. While the former suit was pending and before it had been decided by this court, the Home Installment Company began a suit to foreclose this mortgage. The president of the latter corporation was attorney for the Nolans in the suit of *Nolan* v. *Cook* and had full knowledge of the claim of Cook to the title to the property, but he was not made a party. Plaintiff became aware of the foreclosure suit and brought this suit to enjoin further proceedings thereunder and to cancel the mortgage and quiet his title. The evidence in the case at bar and in the case of *Nolan* v. *Cook,* 81 Or. 287 (159 Pac. 810), is substantially the same and we came to the conclusion in the course of our investigation in that case that the true

south line of Cook's land was identical with the north line of the Council Crest property as platted, and that there was no property upon which the deeds from various parties to Holmes could be effectual. The evidence now before us has not changed but on the contrary has strengthened that conviction. To discuss it in detail would be of no interest or advantage to anyone. Suffice it to say that in our opinion it fully sustains the findings of the lower court in favor of plaintiff, and the decree is therefore in all things affirmed. AFFIRMED.

Submitted on briefs on motion to release attachment September 18, motion denied September 25, 1917, argued January 22, affirmed January 29, 1918.

BANK OF KENTON v. PREBLE.*

(167 Pac. 578; 170 Pac. 302.)

Appeal and Error—Stay—Jurisdiction of Trial Court—Sale of Perishable Property.

1. Notwithstanding appeal, with stay, the trial court has jurisdiction to order sale of property under attachment in the action as perishable property; Section 552, L. O. L., authorizing it, with provision that the proceeds shall be deposited to abide the decision on appeal, if perishable property has been seized to satisfy or secure the judgment.

ON THE MERITS.

Husband and Wife—Agency of Husband for Wife—Execution of Note.

2. The ostensible maker of a note was liable thereon, whether she signed it with her own hand, or the signature was made by her husband by her authority.

Appeal and Error—Review—Questions of Fact.

3. Under Article VII, Section 3, of the Constitution, providing that in actions at law no fact tried by a jury shall be otherwise re-examined in any court, unless the court can affirmatively say there is no evidence to support the verdict, and Section 159, L. O. L., providing that the finding of the court upon the facts shall be deemed a verdict, and

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*On proof of husband's agency for wife by evidence of similar acts by husband, see note in 17 L. R. A. (N. S.) 223. REPORTER.

may be set aside in the same manner and for the same reasons, the Supreme Court has no authority to weigh conflicting evidence in an action at law, and a verdict, or the findings of the court in the absence of a jury, are conclusive, if there is any evidence to sustain them.

[As to execution of written instrument in person's presence and by his direction as act of agent or principal, see note in Ann. Cas. 1912D, 1356.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

On motion to release attached property. Motion denied.

Mr. Allan R. Joy, for the motion.

Mr. George J. Cameron, contra.

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

1. This is a motion for an order releasing property attached to secure the satisfaction of any judgment that might be obtained by the plaintiff against the defendant. The latter represents that after an undertaking on appeal for a stay of proceedings was filed and an appeal to this court perfected, and while the cause was pending in this court, the Circuit Court ordered the sheriff of Polk County to sell certain personal property under attachment in the action, to wit, potatoes, grain, and hay, as perishable property, which order the sheriff complied with. Plaintiff resists the motion.

In regulating matters of appeals, Section 552, L. O. L., provides:

"When the proceedings are stayed, if perishable property has been seized to satisfy or secure the judgment or decree, or has been directed to be sold thereby, the court or judge thereof may order the property to be sold as if the proceedings were not stayed, and the proceeds thereof to be deposited or invested to abide the decision of the appellate court."

The trial court had jurisdiction to make the order in question notwithstanding the appeal. If any question relative to the attachment proceedings is raised by the appeal the same will be considered at the final hearing in passing upon the merits of the case. The motion to release is denied. MOTION DENIED.

Affirmed January 29, 1918.

ON THE MERITS.

(170 Pac. 302.)

This is an action by the Bank of Kenton, a corporation, against A. C. Preble to recover the amount due on a note. There were findings and judgment in favor of plaintiff and defendant appealed. Affirmed.

For appellant there was a brief and an oral argument by *Mr. Allan R. Joy.*

For respondent there was a brief and an oral argument by *Mr. George J. Cameron.*

Department 2. Opinion by MR. CHIEF JUSTICE MCBRIDE.

This was an action to recover upon a promissory note purporting to have been signed by the defendant. The defendant denied the execution of the note and upon the trial there were findings and judgment for the plaintiff, from which an appeal was taken to this court. Judgment was rendered in the Circuit Court on November 6, 1916, and on November 14, 1916, a notice of appeal was duly served and filed. On November 23, 1916, the appeal was perfected by serving and filing the undertaking required by law. On December 30th an application was made and allowed for an extension of time to file the transcript and

to extend the time within which to file a bill of exceptions. The court extended the time to file the transcript, but withheld its decision on the motion for further time in which to prepare and file a bill of exceptions. Within the time allowed by such extension, the transcript was filed having attached to it all the evidence but without any bill of exceptions. A motion was made to strike evidence from the files, which was allowed. Later an *ex parte* order was allowed, permitting the applicant to withdraw the record for the purpose of having the evidence attached thereto certified by the judge, which motion was allowed without prejudice to respondent's right to object to such proceeding. Thereafter at a date not appearing in the record the judge who presided at the trial appended to a transcription of the reporter's notes a certificate to the effect that said transcription was true and correct and contained all the evidence presented in the cause and that it was a true and correct record of said cause.

The findings follow the allegations of the complaint and the judgment is in accordance with the findings, and if we are confined to these the judgment must be affirmed. The appellant's whole case is based upon the proposition that there was no evidence to justify the verdict. The respondent's contention is that as the evidence cannot be brought here except by means of a legal and timely bill of exceptions, that we cannot consider the sufficiency of the evidence in this case, no such bill appearing in the record. It is also contended that there was evidence to justify the verdict and that therefore this court is bound by the findings made by the court below. There are many irregularities in the alleged bill of exceptions but conceding without deciding that it is sufficient, we are of the opinion

that there was some evidence that defendant's name was signed to the note either by herself or pursuant to authorization from her. It is in evidence that when she was notified by plaintiff by letter that her note for $525 was in the bank and she was requested to pay it, she did not deny that it was her note, or repudiate it in any way. The notification was too definite to have been misunderstood. It was mailed her in due course and was as follows:

"Mrs. A. C. Preble,
"29th & Mason Streets,
"Portland, Oregon.

"Dear Madam: We hold your note for $525.00 which is past due since June 21st last. We took this note from Mr. S. F. Cook as security and must ask that it be taken up without further delay.

"Yours very truly,
"BANK OF KENTON."

Mrs. Preble does not deny having received this letter and the presumption is that it was so received. Burke, the cashier of the bank, testified that subsequent to this letter he called Mrs. Preble up over the phone and called her attention to the note and stated:

"She told me she had left it with her husband; that he was out of town and he would attend to it when he came back; that is what she told me."

Mr. Thatcher testified that about two weeks after the note fell due he called on Mrs. Preble with reference to it, and states the conversation thus:

"I told her that we had the note there and asked her what she was going to do about it, and she said that Mr. Preble would attend to it; he was down near Independence some place on the ranch and would be back in about two or three days, and about a week after that I called on her again and she said that Mr. Preble hadn't got back yet and then I asked her how she happened to give Mr. Cook this note and she said—I asked her if they had bought any cattle from Mr.

Cook and she said no; that they had not bought any cattle from him but she had given him this note as an accommodation."

2, 3. The defendant testifies absolutely that she never signed the note mentioned in this action, or any note in favor of Mr. Cook, and makes a plausible explanation as to why she did not repudiate the transaction when asked to pay it, but we think there was in the testimony above recited some evidence tending to show that she recognized the note as hers. Whether she signed it with her own hand or the signature was made by her husband by her authority is not material, as in either case she would be liable. The evidence for the plaintiff tends to show that when payment was demanded by Thatcher she admitted she gave the note. We have no authority to weigh conflicting evidence in an action at law. The verdict of a jury or the findings of the court in the absence of a jury are conclusive upon the appellate court, if there is any evidence to sustain them: Article VII, § 3, of the Constitution, L. O. L., § 159; *McClung* v. *McPherson,* 47 Or. 73 (81 Pac. 567, 82 Pac. 13); *Miles* v. *Swanson,* 47 Or. 213 (82 Pac. 954); *Flegel* v. *Koss,* 47 Or. 366 (83 Pac. 847); *Savage* v. *Salem Mills,* 48 Or. 1 (85 Pac. 69, 10 Ann. Cas. 1065); *Seffert* v. *Northern Pacific Ry. Co.,* 49 Or. 95 (88 Pac. 962, 13 Ann. Cas. 883); *Courtney* v. *Bridal Veil Box Factory,* 55 Or. 210 (105 Pac. 896).

The findings therefore being supported by some evidence we are bound by them even if upon a re-examination here we might be of an opinion different from that arrived at by the Circuit Court. As no other error is assigned in the brief the judgment will be affirmed.

AFFIRMED.

MR. JUSTICE MOORE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Argued January 15, affirmed January 29, 1918.

IN RE WILL OF SUE PARROT KING.

KING v. TONSING, EXECUTOR.*

(170 Pac. 319.)

Wills—Testamentary Capacity—Burden of Proof.

1. The burden of proof was on proponent to establish the testamentary capacity of deceased by a preponderance of testimony.

Wills—Testamentary Incapacity—Sufficiency of Evidence.

2. In proceedings to probate a will, evidence *held* to sustain a finding of testamentary incapacity.

[As to unnatural or unjust disposition of estate as evidence of testamentary incapacity, see note in Ann. Cas. 1917E, 130.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MCBRIDE.

On January 15, 1915, Sue Parrot King, the wife of respondent A. E. King, died leaving what purported to be her last will and testament, whereby the bulk of her estate, which seemed to have been not more than $2,000 in value, was bequeathed to certain minor children of her two sisters, and a small interest in real property in Portland, Oregon, was bequeathed to her sisters Anna E. Chitty and Harriet May Tonsing and the respondent in equal shares, the approximate value of each share being $111. Henry Tonsing, the husband of Harriet May Tonsing, was designated therein as executor and filed the will for probate, whereupon Arthur E. King interposed this contest on the grounds that the deceased was not at the time of the execution of the alleged will of sound and disposing mind, and that said will was procured by undue influence exercised on the mind of deceased by her sisters Mrs. Ton-

*On presumption and burden of proof as to testamentary capacity, see notes in 17 L. R. A. 494; 36 L. R. A. 724, 733. REPORTER.

sing and Mrs. Chitty. The matter was tried out in the County Court before Hon. T. J. Cleeton, County Judge, who found in substance that the will was void by reason of the alleged undue influence; and upon an appeal to the Circuit Court, Hon. C. U. Gantenbein presiding, the decree was affirmed with findings substantially that the deceased was not of sound and disposing mind at the time said will was executed, and was unduly influenced by her sisters. The case is here upon appeal by proponent from this decree.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Clark, Skulason & Clark,* with an oral argument by *Mr. Bardi G. Skulason.*

For respondent there was a brief over the name of *Messrs Griffith, Leiter & Allen,* with an oral argument by *Mr. Harrison Allen.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. The testimony taken in this case is voluminous and somewhat contradictory. The burden of proof was upon the proponent to establish the testamentary capacity of the deceased by the preponderance of testimony, and a careful reading of it satisfies us that in this he has failed. A large number of witnesses, some of them relatives by marriage or otherwise and who knew Mrs. King intimately, have testified as to her weakened mental and physical state, and expressed their decided opinions that she was incapable of making a will. These witnesses were wholly disinterested and their opportunities for knowledge of the true mental condition of deceased were good, and we are inclined to accept their testimony. It is true that other witnesses testified that in their opinion decedent pos-

sessed testamentary capacity, but their opportunities for observation were either slight or they were indirectly or directly beneficiaries under the will. Mr. Clark, who prepared the will at the request of and from data furnished principally by Mrs. Tonsing, testified that he saw nothing to indicate mental incapacity at the time the will was executed, but he was in her presence only a short time and was not as well qualified to judge of her condition as others who saw her frequently and knew her intimately. Considering the kind and affectionate treatment of Mrs. King at all times by her husband, the will was an unnatural one to make. The fact that it was prepared at the request of one of the beneficiaries and by data furnished by her indicates that it was executed in secret; that great pains were taken by Mrs. Chitty and Mrs. Tonsing, whose children were to secure the principal benefit of the will, to keep the fact of its execution from being known to her husband; and that some of these very persons were in the habit of relating to deceased alleged gossip concerning the morals of her husband, none of which was shown to have had any foundation, goes far to induce the belief that undue advantage was taken of her enfeebled mental condition to poison her mind against him, with a view to persuade her to disinherit him to the advantage of the interested parties.

2. Enfeebled mentality, secrecy and self-interest are three dangerous guests to be present together at the making of a will, and they were all there when this will was executed. To attempt to discuss the evidence in detail would needlessly encumber the reports and be of no value to anybody in the future. From a careful consideration of the whole record we are of the opinion that the conclusion drawn from the testimony

by both learned Judges who passed upon this case below, was correct and that the decree should be affirmed.

AFFIRMED.

MR. JUSTICE BURNETT, MR. JUSTICE BENSON and MR. JUSTICE HARRIS, concur.

Motion to dismiss appeal allowed January 29, 1918.

HILL *v.* LEWIS.

(170 Pac. 316.)

Appeal and Error—Effect of Abandoning Appeal.

1. When a party perfects an appeal and then abandons it, his right of appeal is exhausted; the power over the subject is *functus officio*, and cannot be exercised the second time.

From Josephine: FRANK M. CALKINS, Judge.

On motion of respondent to dismiss appeal. Motion allowed.

Messrs. Blanchard & Blanchard, for the motion.

Mr. Oliver S. Brown, contra.

In Banc. MR. JUSTICE BENSON delivered the opinion of the court.

1. Plaintiff moves to dismiss the appeal of the defendant Rose Cheshire for the following reasons: The decree of the trial court was made and entered on September 4, 1917. Thereafter, on September 7, 1917, the defendant Rose Cheshire served and filed her notice of appeal and on September 17, 1917, served and filed her undertaking on appeal. The appeal having been perfected, she neglected to file a transcript within thirty days thereafter

and subsequently on October 24, 1917, filed a second notice of appeal which was followed on November 2, 1917, with service and filing of a new undertaking and thereafter on December 7, 1917, a transcript on appeal was filed in this court. In *Schmeer* v. *Schmeer,* 16 Or. 243 (17 Pac. 864), this court held that when a party perfects an appeal and then abandons it, his right of appeal is exhausted, the power over the subject is *functus officio,* and cannot be exercised the second time. This ruling has been many times reiterated, the latest case being that of *State* v. *Keeney,* 81 Or. 478 (159 Pac. 1165). The appeal should be dismissed and it is so ordered.

APPEAL DISMISSED.

Argued January 18, reversed and remanded January 29, 1918.

OREGON-WASH. R. & N. CO. *v.* JOHNSON.

(170 Pac. 290.)

Highways—Levying Special Road Tax—Budget Law.

1. Under Laws of 1915, page 297, making the budget law (Laws 1913, p. 458) applicable to all districts, etc., having power to levy taxes, except cities of over 150,000 inhabitants, failure of a road district in levying a special road tax to comply with the budget law invalidates the levy, notwithstanding the people of the district assemble in a body to vote on the levy.

From Hood River: WILLIAM L. BRADSHAW, Judge.

Suit by Oregon-Washington Railroad & Navigation Company, a corporation, against Thomas F. Johnson, as sheriff of Hood River County, a municipal corporation. From a decree dismissing the suit, plaintiff appealed. Reversed

Department 1. Statement by MR. JUSTICE BENSON.

This is a suit brought to enjoin the collection of a special road tax attempted to be levied by Road Dis-

trict No. 1 of Hood River County. The complaint assigns a number of reasons why the attempted action of the taxing district is invalid, among them being an allegation to the effect that the road district did not in any respect comply with what is known as the "Budget Law." It is further recited that plaintiff's property must bear the burden of 78.3 per cent of the entire tax so attempted to be levied. It is also averred that one John H. Dunlap, a stockholder, vice-president and general manager of the Wind River Lumber Company, a duly organized corporation, owning a large amount of taxable property in the district, and who was himself a resident, citizen and taxpayer therein, although not the owner of real estate in his own name, was not only refused the privilege of voting at the meeting, but was also denied the right to be heard in objection to the proposed levy. There are many other allegations in the complaint which are not necessary to the present discussion.

A demurrer was interposed to this pleading, which was sustained by the trial court and, plaintiff declining to plead over, a decree was entered dismissing the suit from which plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Charles E. Cochran* and *Mr. Arthur G. Spencer,* with an oral argument by *Mr. Cochran.*

For respondent there was a brief and an oral argument by *Mr. A. J. Derby,* District Attorney.

MR. JUSTICE BENSON delivered the opinion of the court.

1. A number of reasons are urged by plaintiff to sustain its contention that the demurrer should have been

overruled, but we find it unnecessary to consider any of them except the failure of the district to comply with the provisions of Chapter 234, Laws of 1913, the first section of which opens with the following language:

"It shall be unlawful for any tax to be levied, proposed or adopted, for any county, unless an estimate shall have first been made of the amount of money proposed to be raised by taxation for the ensuing year and such estimate published, and opportunity for a full and complete discussion thereof allowed in the manner hereinafter provided for."

The remainder of the act prescribes the details for making the budget effective and of practical value. This legislation applied to counties only, until the legislature in 1915 enacted additional provisions as follows:

"Sec. 1. All districts and corporate bodies or organizations having power to levy taxes, except cities having a population of over 150,000 inhabitants according to the last government census, are hereby made subject to the provisions of chapter 234 of the General Laws of Oregon, 1913, and any other budget law that is now or may hereafter be in force applying to counties having a population of less than 150,000 inhabitants.

"Section 2. In complying with such law or laws the duties imposed on the county clerk or auditor shall be performed by the clerical officer or auditor of the tax-levying district and the duties imposed upon the county court shall be performed by the tax-levying board or body of the district, and the duties imposed upon any other officer of the county shall be performed by the corresponding officer of such district, if there be one, and if there be none, then by such officer as may be designated by the tax-levying board or body of the district": Chap. 222, Laws 1915.

It requires but a cursory examination of this legislation to show that it applies the budget law to road districts as well as to counties. Defendants urge with

some force that the budget law was enacted to meet the demand of the people that a limitation should be placed upon the action of their representatives, composing boards and the like, to check extravagant tax levies, but that when the people of a tax-levying area are assembled in a body to vote upon such a question the reason for the law fails. The answer to this position is twofold. First, it may well be observed that the act of 1915 specifically applies its provisions to all tax-levying districts other than certain specified exceptions. Second, it must be remembered that Section 3 of the act of 1913, provides that any *taxpayer* who desires shall be heard in favor of or against any proposed levies. It is also to be noted that at a road district meeting no person is permitted to vote or be heard who is not a *bona fide* resident of the district, and the owner of real estate the title to which is in his or her own name. This, of course, excludes many and, in some instances, even a majority of the taxpayers. Hence, if there be no budget hearing as provided by the law of 1913, many taxpayers, like the plaintiff herein, have no opportunity to be heard at any time, which fact we think furnishes an excellent reason for the enactment of the law of 1915.

It has been held by this court in *State ex rel.* v. *Johnson,* 80 Or. 107, 112 (156 Pac. 579), that a disregard of the budget law is fatal to the validity of a tax levy. It follows that the court erred in sustaining the demurrer. The decree is therefore reversed and the cause will be remanded with directions to overrule the demurrer and to take such further proceedings as may be required, not inconsistent herewith.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued January 18, reversed and remanded January 29, 1918.

WIND RIVER LUMBER CO. *v.* JOHNSON.

(170 Pac. 291.)

From Hood River: WILLIAM L. BRADSHAW, Judge.

Suit by Wind River Lumber Company, a corporation, against Thos. F. Johnson, as sheriff of Hood River County, Oregon, a municipal corporation. From a decree dismissing the suit plaintiff appealed. Reversed and remanded.

For appellant there was a brief over the names of *Mr. George S. Shepherd, Mr. W. W. McCredie* and *Mr. W. McElroy,* with an oral argument by *Mr. Shepherd.*

For respondents there was a brief and an oral argument by *Mr. A. J. Derby,* District Attorney.

Department 1. MR. JUSTICE BENSON delivered the opinion of the court.

This cause was argued and submitted in connection with the case of *O. W. R. & N. Co.* v. *Johnson,* filed January 29, 1918, the facts and issues in the two cases being substantially identical. Therefore, upon the authority of that case, the cause is remanded with directions to overrule the demurrer, and for such further proceedings as may be proper and not inconsistent herewith. REVERSED AND REMANDED.

MR CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued January 16, affirmed January 29, 1918.

WILLIAMS v. LOMBARD.*

(170 Pac. 316.)

Municipal Corporations—Automobile Collision—Last Clear Chance—Instruction.

1. In an action for injuries in collision between an automobile owned by defendants and the sled on which plaintiff was riding, where there was evidence tending to show that there were arc lights at the location extending for a short distance over the streets, that defendants' car had its side lights burning, and that there was considerable snow on the ground, the court properly instructed on the doctrine of last clear chance, since the circumstances might well be taken into consideration by the jury in determining whether or not defendants' chauffeur testified truthfully as to when he first discovered plaintiff and his sled.

[As to when contributory negligence does not bar recovery, see notes in 30 **Am. Rep.** 190; 38 **Am. Rep.** 637.]

Damages—Personal Injuries—Aggravation of Old Injuries.

2. In an action for injuries in collision by defendants' automobile with plaintiff's sled, the court properly refused to instruct at defendant's request that the jury could not allow plaintiff anything if they should believe from the evidence in the case that his old ailments or injuries were aggravated or made worse because of the accident.

Damages—Pleading.

3. Plaintiff cannot recover for an aggravation of prior injuries, unless such conditions are pleaded.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Action by Otto Williams against Gay M. Lombard and Mary T. Lombard, husband and wife, to recover damages for personal injuries received by being run down by an automobile owned by defendants. From a judgment in favor of plaintiff for $1,250, rendered upon a verdict, defendants appeal. Affirmed.

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*On origin, function and mode of operation of doctrine of last clear chance, see notes in 55 **L. R. A.** 418; 36 **L. R. A. (N. S.)** 957.

On the question of liability for collision between automobiles or automobile and another vehicle at or near corner of streets or highways, see note in **L. R. A.** 1916A, 745.

For rules of the road governing vehicles proceeding in opposite direction, see note in 41 **L. R. A. (N. S.)** 322; and as to vehicles proceeding in same direction, see note in 41 **L. R. A. (N. S.)** 337.

REPORTER.

Department 1. Statement by MR. JUSTICE BENSON.

Plaintiff instituted this action to recover damages for personal injuries received in a collision between an automobile owned by defendants and a sled upon which plaintiff was riding. The accident occurred on the evening of January 20, 1916, on Lovejoy Street, between 24th and 25th Streets, Portland, Oregon. The complaint alleges negligence upon the part of defendants in several particulars among which are: A violation of the ordinance requiring a chauffeur to pass other vehicles to the left; that they failed to keep a proper lookout; that they failed to sound the horn or give any proper alarm; that they were driving their car at an excessive speed and that they neglected to utilize the "last clear chance" to save plaintiff from injury.

The answer admits the collision but denies all other allegations of the complaint, and affirmatively pleads contributory negligence. Defendants appeal from a judgment in favor of the plaintiff. AFFIRMED.

For appellants there was a brief over the names of *Mr. F. C. Howell* and *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. Howell.*

For respondent there was a brief over the names of *Mr. J. G. Simmons* and *Messrs. Pearcy & Mendenhall,* with an oral argument by *Mr. Simmons.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. Defendants present two questions for our consideration. One is that the court instructed the jury upon the doctrine of the "last clear chance" in the

absence of any evidence which would render such instruction pertinent. The only direct testimony relating thereto is that of defendants' chauffeur who testified quite positively that he did not see plaintiff or his sled until he was within five feet of them and that he instantly used every possible endeavor to prevent the accident. However, there was evidence tending to show that there were arc lights at the corners of 24th and 25th Streets extending out for a short distance over the streets and that defendants' car had its side lights burning and there was considerable snow on the ground. These circumstances might well be taken into consideration by the jury in determining whether or not the chauffeur testified truthfully as to when he first discovered plaintiff and his primitive equipage and the court did not err in instructing the jury thereon.

2, 3. Defendants next urge that the court erred in refusing to give the jury the following instruction:

"And I further instruct you that you cannot allow the plaintiff anything in this case, if you should believe from the evidence in this case, that those old ailments or injuries were aggravated or made worse because of the accident the plaintiff complains of in this case."

We can only conjecture what counsel intended to express when he framed this charge; but we feel confident that he never meant what the language used clearly imports, which is, that if the injuries received at the time of the accident resulted in aggravating old ailments or injuries, that fact would be a complete defense even as to the hurts which were the immediate result of the collision. It is true that plaintiff cannot recover for an aggravation of prior injuries unless such conditions are pleaded, but no such doctrine is

suggested in the instruction submitted to the court and it was properly refused.

The judgment of the lower court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE BURNETT concur.

Submitted on briefs January 9, affirmed January 29, 1918.

PELTON WATER WHEEL CO *v.* OREGON IRON CO.*

(170 Pac. 317.)

Pleading—Inconsistent Defenses—Election.

1. In action for possession or value of machine sold under conditional contract and resold by vendee, defenses that vendee bought on consignment, and that he was agent with right to collect, were inconsistent with a third defense that the sale was unconditional and without reservation, and defendant was properly required to elect.

Sales—Conditional Sales—Duty of Seller to Collect—Subsequent Vendees.

2. Where a machine was made to order and title reserved in plaintiff and vendee resold, the question of suretyship did not arise so as to require any effort on part of plaintiff to collect from the vendee, but plaintiff could depend solely on the subsequent purchaser, and not file claims in a bankruptcy proceeding of the conditional vendee.

Sales—Conditional Sales—Purchaser from Conditional Vendee—Rights.

3. A conditional vendee of a machine cannot pass title to even a *bona fide* purchaser, but he can pass a defeasible interest, and the subsequent purchaser can make his title absolute by complying with the terms of the contract.

[As to what constitute conditional sales, see notes in 46 **Am. St. Rep.** 295; 94 **Am. St. Rep.** 234.]

Sales—Conditional Sales—Payment—Acceptance of Notes.

4. Under a conditional contract of sale of a machine providing that the title shall not pass until payment, "including deferred payments and notes or renewals thereof," the taking of promissory notes for

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*On duty of purchaser of property from conditional vendee, with right to sell, to see that latter's vendor is paid, see note in 26 **L. R. A. (N. S.)** 585. REPORTER.

the amount due would not be a payment, unless so agreed and understood.

Sales—Conditional Sales—Machine Affixed to Realty—Bona Fide Purchasers—Burden of Proof.

5. The burden is on a purchaser from a conditional vendee of a machine affixed to the realty of such vendee, to show that he is a *bona fide* innocent third party.

Sales—Conditional Sales—Affixing to Realty—Subsequent Bona Fide Purchaser—Pleading.

6. One cannot claim that he is a *bona fide* innocent purchaser of a machine affixed to realty, his seller being a conditional vendee, where the theory of defense was that there was no conditional sale, or that the conditional vendee was the agent of the plaintiff.

Fixtures—Conditional Contract of Sale—Third Persons—Evidence as to Nature of Property.

7. A contract for reservation of title as to a machine *held* to be of great weight in determining whether the machine had been so attached to the realty as to become a part thereof, as against a third party.

From Multnomah: ROBERT G. MORROW, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is an action brought by the Pelton Water Wheel Company against the Oregon Iron and Steel Company for the recovery of the possession or the value of a certain double Pelton-Francis turbine generator, with the appurtenant equipment, which was contracted to be sold by the former company to the Pacific Electric Engineering Company, an Oregon corporation, which will hereafter be designated as the Engineering Company, under a contract by the terms of which the title thereto was to remain in the seller until the price was fully paid. This machine was resold by the Engineering Company to the defendant Oregon Iron and Steel Company, the latter paying for it in full. The defendant claims this was done without any actual notice of the plaintiff's claim for security. The Engineering Company paid part of the purchase price and the plaintiff is claiming the balance, or a return of the generator, from the defendant,

against which claim the defendant sets up several defenses. The cause was tried by the court without the intervention of a jury. The court made findings of fact and rendered judgment in favor of the plaintiff for $1,719.35, from which defendant appeals.

On September 1, 1909, the Pelton Water Wheel Company made a written contract to sell to the Engineering Company the turbine generator, the subject of this suit, for $5,600. This contract of sale is annexed to the bill of exceptions in the case. It contains ten typewritten pages of specifications and three pages of printed matter setting forth the terms of the sale. Among other terms contained in the printed matter are the following paragraphs:

"That the legal title in and to the apparatus or machinery described in said specifications shall not pass from the company until all payments provided for in this agreement, including deferred payments and any notes or renewals thereof, shall have been fully made by said purchaser in cash; and the same shall hold true whether the said apparatus or machinery be attached to the realty or not; and the purchaser agrees to take every step necessary to assure and maintain in the company said legal title to all of said apparatus and machinery."

"If default be made in any of the payments due the company in the manner, form, and at times hereinafter specified, the company may retain any and all payments which shall theretofore have been made, as liquidated damages, and shall be entitled to the immediate possession of the property described in said specifications and referred to herein, and may enter upon the premises of the purchaser where such apparatus or machinery shall be located or stored and remove the same, at such time and for such purpose as it may desire, nor shall said entry and removal be held to constitute any prejudice to the right of the company to recover or sue for any further damages by reason of the purchaser's failure to make the pay-

ments required or to surrender the said apparatus or machinery when required."

The contract was signed by the Pelton Water Wheel Company and by the Engineering Company, as purchaser, and underneath the latter's signature was an approval as follows: Approved for the Oregon Iron and Steel Company, A. S. Patullo, secretary." Pursuant to the terms of the above agreement the turbine generator was delivered to the Engineering Company which resold it to the Oregon Iron and Steel Company for $6,020. The full purchase price was paid and it was installed in the latter company's plant near Oswego, Oregon. Of the $5,600, the purchase price to be paid by the Engineering Company to the Pelton Water Wheel Company, about $3,900 was paid, leaving a balance of $1,719.35 due on the date when this action was started. After making such part payments, the Engineering Company fell behind and finally, to cover its balance, executed a number of notes to the Pelton Water Wheel Company. Subsequently, in 1913, the Engineering Company went through bankruptcy and paid a dividend, but the Pelton Water Wheel Company never proved its claim against the insolvent estate, and, on September 9, 1915, brought this action against the Oregon Iron and Steel Company.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Wood, Montague & Hunt* and *Mr. Prescott W. Cookingham.*

For respondent there was a brief over the name of *Messrs. Beach, Simon & Nelson.*

MR. JUSTICE BEAN delivered the opinion of the court.

The court required the defendant to elect upon which of the defenses pleaded in its answer it would rely, and this is assigned as error. The defendant answered to the purport: (1) that the conditional vendee bought the machinery on consignment from plaintiff; (2) that the conditional vendee as a matter of fact was not a vendee, but was an agent of plaintiff with the right to collect from the defendant; and (3) that the plaintiff made an outright sale without reservation to the conditional vendee.

1. The third defense is inconsistent with the first and second and it is manifest that all three defenses cannot be true. It was within the province of the trial court to require the defendant to elect upon which of the defenses it would rely. There was no error in so ruling.

The main question contended for by counsel for defendant is that as a matter of law the Oregon Iron and Steel Company is not required to pay plaintiff any sum remaining unpaid on the turbine generator. At the close of the evidence defendant moved the court for a judgment of nonsuit and assigns the denial thereof as error. From a reading of all the evidence we are led to believe that the same tended to show the facts substantially as above stated and that the motion for a nonsuit was properly denied.

2. It appears that the plaintiff manufactured the turbine generator according to plans and specifications and made a contract for sale thereof by which the title was to remain in the plaintiff until the same was paid for. The plaintiff owned the title to the machine and no legal title passed to the Engineering Company; therefore, no legal title thereto passed to the defendant. We do not consider that the question

of suretyship arises in the case, but rather that of ownership of the turbine in controversy. The original contract clearly and specifically reserves the title to the machine in plaintiff. Defendant approved the contract for the sale and hence must have known of the terms thereof at the time. Nothing has taken place since then to change the relation of the parties or the legal title to the property.

3. It is a fundamental doctrine of the common law that in general no one can transfer a better title to a chattel than he himself possesses: 1 Mechem on Sales, § 154. The universal and fundamental principle of our law is that no man can be divested of his property without his own consent and consequently even an honest purchaser under a defective title cannot hold against the true proprietor: Id., § 155. According to the general rule in order to pass the title to a chattel, as against the seller, there must be a valid, existing and completed contract of sale: 35 Cyc., p. 274. In the case of a so-called conditional sale, or contract to sell, where by the express terms of the agreement the possession of the chattel is to be delivered to the buyer, but the property in it is to remain in the seller until payment of the price, the title to the property does not pass to the buyer until the condition of payment is performed. And where the question is unaffected by statute, the buyer cannot pass title to another even to a *bona fide* purchaser for value. But although the title to the property does not pass the buyer acquires a defeasible interest, which before breach of condition he may sell, and which upon performance of the condition becomes perfect. Such a second vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract: Tiffany on Sales,

pp. 135–138; 35 Cyc., p. 675 et seq.; *Singer Mfg. Co.* v. *Graham,* 8 Or. 17 (34 Am. Rep. 572); *Schneider* v. *Lee,* 33 Or. 578 (17 Pac. 269); *Christenson* v. *Nelson,* 38 Or. 473 (63 Pac. 648); *Johnson* v. *Iankovetz,* 57 Or. 24 (102 Pac. 799, 110 Pac. 398, 29 L. R. A. (N. S.) 709); *McDaniel* v. *Chiaramonte,* 61 Or. 403 (122 Pac. 33); *Francis* v. *Bohart,* 76 Or. 1–5 (143 Pac. 920, 147 Pac. 755, L. R. A. 1916A, 922); *International Harvester Co.* v. *Bauer,* 82 Or. 686 (162 Pac. 856); 1 Mechem on Sales, § 599.

4–7. The case at hand is not like one where a manufacturer or wholesale dealer ships goods on consignment to a retail merchant to be sold in the ordinary course of trade and turn the proceeds over to the seller. The conditional sale under consideration was made on credit and the contract provided for renewals and extensions. According to the stipulations of the contract to sell quoted above the taking of the promissory note of the Engineering Company by plaintiff for the amount due would not be a payment unless so agreed and understood. The leniency shown in extending the time for payment of the property did not constitute laches or tend to vest the legal title in the conditional vendee. The defendant argues that a conditional sale of property affixed to the realty is void as against a *bona fide* innocent third party. The burden of proving that the defendant was a *bona fide* purchaser was upon itself. In this respect the defendant company failed. There was evidence to support the finding of the trial court to the effect that the defendant was not an innocent purchaser, or without notice, and as such finding has the force and effect of the verdict of a jury it cannot be disturbed. In addition to this such claim is not specially pleaded and is not in consonance with the theory of the defendant's

case as demonstrated by its pleading. From a legal standpoint the contract for the reservation of the title in plaintiff under the circumstances of this case would have great weight in determining whether or not the machine had been so attached to the realty as to become a part thereof, or was still a chattel: 1 Jones on Mtgs. (7 ed.), § 431. The plaintiff acted in good faith in the transaction and concealed nothing from defendant. It seeks to recover only the balance unpaid. At the time the defendant had all the means of knowledge of the true conditions of the sale and title to the apparatus. Its magnanimity in paying the Engineering Company without ascertaining whether the contract which it had approved had been complied with, or taking indemnity from that company in the construction of its plant, if the latter was the case, should not work a hardship upon plaintiff or a forfeiture of its title to the machine: See *Van Allen* v. *Francis,* 123 Cal. 474, 478 (56 Pac. 340).

The findings of the trial court were supported by competent evidence. Such findings support the judgment based thereon. We find no error in the record and the judgment is affirmed. AFFIRMED.

MR. JUSTICE MCCAMANT took no part in the consideration of this case.

Argued January 22, affirmed January 29, 1918.

GRIMES v. CITY OF SEASIDE.*

(170 Pac. 310.)

Municipal Corporations—Street Improvements—Jurisdiction.

1. Where plaintiffs deeded land to the public as a highway and the dedication was accepted by the County Court, and they later deeded an extension on condition that the county road should be vacated, and stood by without objection while the city improved the street, the city had jurisdiction to assess on the abutting land the cost of improving the street as a city and not a county road.

[As to the purposes for which a municipal corporation may levy assessments and taxes, see note in 16 **Am. St. Rep.** 365.]

Municipal Corporations — Street Improvements — Specifications — Patented Article.

2. The city does not, by specifying patented paving, make an illegal contract, where the owner of the patent offers to permit its use on reasonable terms by any other person.

Municipal Corporations — Street Improvements — Lien Dockets — Sufficiency.

3. Where the lien docket showed the names of persons, the description of the land and the amount of the assessment and the manner and time for its payment, it was sufficient, although it did not expressly state that the persons named were severally the owners of the real property, nor that the sums named after the description of land were the amounts respectively imposed upon the lands described.

Municipal Corporations—Street Improvements—Lien—Foreclosure.

4. Under Seaside Charter, empowering the city to sue for the cost of improvement and to have a lien therefor decreed on the premises, the city was authorized to have a foreclosure of a lien of a special assessment for paving street.

From Clatsop: JAMES A. EAKIN, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is a suit by G. M. Grimes against the City of Seaside, a municipal corporation and G. E. Shaver its then marshal, to annul a contract for the paving of a part of Broadway Street, formerly known as Bridge

*As to validity of contract of municipal corporation for material patented or held in monopoly where a letting to the lowest bidder is required, see notes in 18 **L. R. A.** 45; 5 **L. R. A. (N. S.)** 680; 46 **L. R. A. (N. S.)** 990. REPORTER.

Street, to enjoin proceedings for the collection of a delinquent assessment, and to cancel the docket of city liens. From a decree declaring the assessment valid, the lien thereof subsisting, foreclosing such encumbrance and directing a sale of the land benefited by the improvement, the plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. Hayward H. Riddell* and *Mr. H. Daniel,* with an oral argument by *Mr. Riddell.*

For respondents there was a brief over the names of *Mr. George C. Fulton, Mr. A. C. Fulton* and *Mr. Victor J. Miller,* with an oral argument by *Mr. A. C. Fulton.*

MR. JUSTICE MOORE delivered the opinion of the court.

It is contended that the municipality was without jurisdiction to make the improvement, or to levy a special assessment for any part of the cost thereof upon adjacent land only, because the highway undertaken to be benefited is a county road and subject to the control of the County Court of Clatsop County, Oregon. No reference to any of the provisions of the charter of the City of Seaside, adopted at a special election held February 28, 1912, will be made, nor will the proceedings undertaken by the council of that municipality, to initiate and make the improvement be alluded to, since it is conceded that the clauses of the organic law of that city and of the ordinances and resolutions enacted and adopted pursuant thereto were strictly obeyed, except in one instance hereinafter mentioned.

Broadway Street is represented on the map of the City of Seaside, which was received in evidence, as commencing on the east at O'Hanna Creek, thence west crossing the Necanicum River to the Pacific Ocean.

The highway immediately east of the Necanicum River and extending northerly and southerly and nearly parallel therewith is designated as Seventh Street, which has been held to be a county road: *Cole* v. *Seaside,* 80 Or. 73 (156 Pac. 569).

The evidence shows that E. M. Grimes, C. C. Grimes and S. K. Stanley and the wife of each respectively, on June 29, 1892, executed to the public a deed conveying as a highway a strip of land 30 feet wide, being 15 feet on each side of a center line, beginning at a point in the middle of the county road (Seventh Street) opposite the middle of the east end of the bridge across Necanicum River; thence west to the middle of the east end of such bridge; thence crossing the river to a post on the west bank thereof about 80 feet north of the west end of the bridge; thence west 200 feet; thence north 100 feet, more or less, to the intersection of the middle of Pine Street extended eastward; and thence westward along the latter street to low-tide line of the Pacific Ocean. Such conveyance was made upon condition that Clatsop County would, within a specified time, build a substantial bridge across the Necanicum River on the designated line.

C. A. McGuire and his wife on July 5, 1892, also executed to the public a deed to a strip of land 15 feet in width bordering upon Broadway Street, but as this tract is situate east of the Necanicum River, no attention need be paid to such conveyance. The 30-foot strip of land described in the deed executed by E. M. Grimes and others to the public was surveyed June 8, 1893, as appears from copy of the field-notes and a blueprint of the map thereof, which show that the middle line of the bridge across the Necanicum River and for a distance of about 150 feet from the west bank of that stream was run south 83° 50′ west; thence west 200

feet; thence north 139 feet to Pine Street, and thence west along that street to the Pacific Ocean.

The records of the County Court of Clatsop County show that on July 6, 1892, a firm of contractors offered to build a bridge across that river for the sum of $1,630, which bid was accepted and it is conceded that the structure was thereafter completed.

By reason of the uncertainty of the point of beginning of the highway at Seventh Street, a resurvey of the line west thereof was completed April 20, 1905. Field-notes and a map of the survey were filed in the office of the county clerk six days thereafter. A blue-print of that map was received in evidence, and from an examination of such duplicate the course from the beginning point is indicated as N. 89° 58′ west to the east end of the bridge on the Necanicum River; thence N. 77° 30′ W. 456.12 ft. thence N. 89° 29′ W. 146.4 ft. to the former line which extending north intersected Pine Street. The County Court on May 6, 1909, ordered that the dedication and plat of such survey be recorded and that the bridge be changed as soon as possible.

The plaintiff, G. M. Grimes, his wife and others on June 1, 1908, executed conveyances, dedicating an extension of Bridge Street west of the Necanicum River upon condition however, that the county road should be vacated. It was the purpose of these grants to give to the public a right to the use of Broadway Street, as indicated on the plat of Seaside, extending west of the stream to the Pacific Ocean. An examination of the courses noted on the blue-print, evidencing the resurvey, discloses that commencing at the west end of the bridge the line extends northwesterly, while the street as dedicated runs west, and that one tract of the plaintiff's land which was assessed for the improvement lies south and two other parcels are situate north of Broad-

way, which street in front of his premises that border thereon is located wholly south of the line of the highway as resurveyed April 20, 1905, so that no part of the improvement abutting upon his premises was made upon the county road.

1. Whether such highway was ever legally adopted or vacated is not necessary to a decision herein, for the plaintiff knew that Broadway Street which was widened by his consent, was being improved, and until the work was fully completed he never applied to the court to prevent the betterment of his land. We conclude, therefore, that the City of Seaside had jurisdiction to assess upon the abutting land the cost of improving Broadway Street west of the Necanicum River, and that this street is not a county road.

By resolution of the Common Council of the City of Seaside, it was determined to grade and improve Broadway Street with "Gravel Bitulithic" pavement, making the necessary artificial stone curbs on each side, installing catch basins and providing for surface drainage. Warren Brothers Company, a corporation, the owners of the patent right for mixing and using bitumen and crushed rock or gravel, according to a prescribed formula for road building and surfacing, and also the owner of the copyright name "Gravel Bitulithic" mailed to the proper officer of Seaside a "license agreement" permitting any contractors having adequate machinery, to use its patent right and trademark upon equal conditions, which authority is of similar import as set forth in the case of *Johns* v. *City of Pendleton,* 66 Or. 182 (133 Pac. 817, 134 Pac. 312, Ann Cas. 1915B, 454, 46 L. R. A. (N. S.) 990). Thereafter plans and specifications of the proposed improvement were duly made and filed and notice published that the contract would be let to the lowest responsible bidder, and

at the time so designated the Warren Construction Company, a different corporation from that of Warren Brothers Company, being the lowest bidder for furnishing the material and performing the work, and possessing proper facilities, was awarded the contract.

2. It is maintained that prescribing in the ordinance and specifications the use of a patented article, thereby excluded competition and hence the contract is void as creating a monopoly. This question is so completely answered by Mr. Chief Justice McBRIDE in *Johns* v. *City of Pendleton,* 66 Or. 182 (133 Pac. 817, 134 Pac. 312, Ann. Cas. 1915B, 454, 46 L. R. A. (N. S.) 990), a case involving similar facts, that no further elucidation is deemed essential or will be made, except merely to refer to the cases of *Sherrett* v. *Portland,* 75 Or. 449 (147 Pac. 382), and *Temple* v. *Portland,* 77 Or. 559 (151 Pac. 724), where it was held that there can be no valid objection made to the specification of a patented pavement, if the patentee offers to all bidders alike the right to make use of the protected article upon reasonable terms.

It is argued that the entry of the assessment for the improvement of the street in the Docket of City Liens was insufficient to create an encumbrance upon the plaintiff's land, and this being so, no authority existed for decreeing a foreclosure of the alleged claim. Section 42 of the organic law of Seaside declares:

"When a special assessment shall be confirmed, the Auditor and Police Judge shall indorse a certificate thereof upon the roll, showing the date of confirmation. When any special assessment shall be confirmed by the Council, it shall be final and conclusive. All special assessments from the date of confirmation thereof, constitute a lien upon the respective lots or parcels of land assessed, and shall also be a charge against the person to whom assessed until paid. Upon the confirmation

of such assessment it shall be the duty of the Auditor and Police Judge to enter a statement thereof in the Docket of City Liens."

Section 43 of the charter defines such docket and prescribes that there shall be entered therein

"the following matters in relation to assessments for the improvement of streets. 1. The name of the owner thereof, or that the owner is unknown. 2. The number or letter of the lot assessed and the number or letter of the Block and the town or addition in which it is situated, or, if a tract of land, a description of the tract of land. 3. The sum assessed upon such lot or tract of land and the date of entry. 4. The time and manner in which the assessment is to be paid."

A copy of that record was received in evidence, and as far as material herein, reads:

"Lien Docket Town of Seaside. Assessment of Bitulithic Pavement on Broadway West 1716.6 ft. Street Assessment No. 15 due and payable the 29th day of Sept. 1914, * * G. M. Grimes. Beginning at the intersection of the north line of Broadway with the east line of Third Street; thence east 176.47 feet to the west line of Fourth Street; thence North 86.94 feet; thence west to the east line of Third Street; thence south 86.84 feet to the place of beginning, $798.82."

Two other tracts of land are assessed to him in the same manner, describing the premises with equal particularity and imposing a charge on each parcel respectively of $867.35 and $20.60, amounting to $1,686.77.

A certificate appended to the docket states:

"That the above and foregoing Assessment Roll No. 15 was accepted and confirmed by Ordinance No. 212, duly passed and approved on the 29th day of September, 1914."

"(Signed) J. L. BERRY.
"Auditor and Police Judge."

3. It is argued that this record does not state the name of the owner of any parcel of land therein described, nor the sum assessed upon any lot or tract, nor the time or manner in which the assessment was to be paid. The lien docket does not in express terms declare that the names of the persons appearing at the left of the pages thereon are severally the owners of the real property so described, nor state that the sums of money severally placed at the right of the pages after each description of land were the amounts imposed upon the premises. From the title of that part of the book, as hereinbefore set forth, and from the excerpts made therefrom, these facts are fairly inferable from such record. Though the undertaking to improve Broadway Street was to create a lien upon the land benefited, and the proceeding was *in invitum,* all the requirements that could have been of any advantage to the persons to be charged with the assessment were sufficiently complied with: Hamilton, Special Assess., § 710; *Schwiesau* v. *Mahon,* 110 Cal. 543 (42 Pac. 1065).

4. It is insisted that the charter does not authorize a foreclosure of such lien. Section 45 of the municipal organic law contains clauses as follows:

"The City of Seaside shall have power to bring suit in the Circuit Court of the State of Oregon for Clatsop County against the owner or owners of lot or lots, block or blocks, parcel or parcels of land upon which the cost of such improvements or repairs might or could have been charged or imposed, and which were benefited thereby. * * In any such suit so instituted all persons whose property is, or would be, so liable for the payment of any such proportion of the assessment aforesaid, shall be joined as parties defendant in one action, and the judgment rendered therein shall be a several judgment *in rem* against each of said lots or parcels of land owned by each of the several defendants for its proportion of the cost of the improvement and costs

and disbursements, and the lien therefor shall be decreed upon the premises. The general laws of the State of Oregon governing suits in equity, service of summons, and other process, shall apply to any such suit."

The trial court was thus clothed with ample authority to declare that the lien subsisted, to order a foreclosure thereof, and to direct a sale of the land. It follows that the decree should be affirmed and it is so ordered.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Argued December 6, reversed and remanded December 27, 1917. Motion to retax costs allowed in part January 29, 1918.

CAPLES *v.* DITCHBURN.*

(169 Pac. 510.)

Attorney and Client—Employment—Evidence—Satisfaction of Judgment.

1. That defendant, sued for money collected by him on a judgment obtained by plaintiff, signed the satisfaction in his name as attorney for plaintiff, is some evidence that plaintiff employed him as attorney in the action in which the judgment was recovered; "attorney," as distinguished from "counsel," having under Sections 1074, 1083, L. O. L., power to satisfy judgment.

[As to implied authority of attorney in conducting litigation, see note in 132 **Am. St. Rep.** 148.]

Attorney and Client — Action for Money Collected — Presumption — Burden of Proof.

2. On evidence that plaintiff owned a judgment and that defendant as attorney collected it, the presumption is that plaintiff owned all the money collected; so that, if defendant would reduce plaintiff's recovery or postpone the right, he must do so by offering evidence, plaintiff not being required to anticipate defenses relied on.

*On necessity of demand as a condition of action to recover money collected by an attorney, see note in 28 **L. R. A. (N. S.)** 626.

REPORTER.

Attorney and Client—Action for Money Collected—Demand—Necessity of Proof.

3. The answer in an action against an attorney for money collected claiming part of the money and justifying possession and detention of the remainder, it is unnecessary for plaintiff to give evidence of demand of payment, which it is obvious would have been idle.

From Multnomah: JOHN P. KAVANAUGH, Judge.

This is an action by H. H. Caples against John Ditchburn for money had and received. From a judgment of nonsuit plaintiff appealed. Reversed and remanded.

For appellant there was a brief over the name of *Messrs. Jenkins & Crawford,* with an oral argument by *Mr. B. B. Crawford.*

For respondent there was a brief over the names of *Mr. John Ditchburn* and *Mr. Carl M. Mack,* with an oral argument by *Mr. Ditchburn, in pro. per.*

Department 2. Opinion PER CURIAM.

The plaintiff appealed from an involuntary judgment of nonsuit and the only question for decision is whether there was enough evidence to take the cause to the jury.

It is alleged in the complaint that the plaintiff obtained a judgment for $275, with costs and disbursements, in an action in which the defendant acted as his attorney; that the defendant collected the full amount of the judgment; and that the defendant has failed, after demand made, to deliver to the plaintiff the amount collected, less attorney's fees agreed upon.

The answer avers that a barge load of wood, which the plaintiff had agreed to deliver to the defendant, was attached and that

"it was agreed by and between this plaintiff and this defendant, together with Mr. A. Hansen, an attorney at law, authorized to and practicing in the state of Oregon, to bring an action to recover the possession of the said wood * * it being understood and agreed that the defendant would pay to the plaintiff, the sum of $1.75 per cord for all wood recovered, or found by the court or jury to have been taken off the barge * * that there was to be no other or further consideration for legal services or otherwise"; that pursuant to the agreement an action was commenced "and it was found that 110 cords of wood had been taken; that the said wood was not recovered, and that the defendant thereupon became indebted to this plaintiff in the sum of $192.50; that it was further understood and agreed, that this defendant should not pay the same, and that the same should not be due and owing, until the said wood or its value was recovered by this defendant; that on or about the 20th day of May, 1915, this defendant recovered the value of said wood, and became indebted to this plaintiff, in the sum of $192.50; that thereafter, this defendant as an attorney at law, advised and consulted to and with the plaintiff, in regard to various matters of business and appeared as an attorney at law in certain court proceedings, of the reasonable value of $10, leaving a balance owing to plaintiff of $182."

The answer contains another separate defense which is to the effect that two brothers of the plaintiff were indebted to the defendant and in consideration of the defendant agreeing to postpone that indebtedness the plaintiff stipulated that the moneys due him from the defendant "need not and should not be paid or become due until a final adjustment between the brothers themselves and this defendant"; and "that there has been no final settlement or adjustment between the said brothers and this defendant and that said sum of $182 is not yet due from defendant to plaintiff herein."

Aside from denials, the reply admits that an action was prosecuted for the recovery of the wood, or its value, taken from the barge and alleges that it resulted "in the judgment mentioned in plaintiff's complaint herein."

The plaintiff offered, and the court received without objection, a certified copy of the judgment which had been obtained by the plaintiff together with a satisfaction thereof. The plaintiff was then sworn and testified that he had had a conversation with the defendant "in connection with this action against McCrum and others in regard to collecting the judgment, and he told me that he had collected the full amount of the judgment." The plaintiff declined to offer any further evidence and the court then granted an involuntary judgment of nonsuit.

1. The gist of the complaint is that the defendant as the attorney for plaintiff collected money on a judgment held by the plaintiff. By his answer the defendant admits that he is an attorney. The plaintiff alleges that he obtained a judgment for the wood received from the barge; and a fair construction of the answer authorizes the statement that the defendant alleges and therefore admits that such a judgment was rendered. Moreover, a certified copy of the judgment proves that it was in fact obtained. The certified copy of the satisfaction of the judgment is evidence that John Ditchburn collected the amount due on the judgment; the testimony of the plaintiff to the effect that the defendant told the witness "that he had collected the full amount of the judgment" is additional evidence that the defendant made the collection; and the allegation in the answer "that on or about the 20th day of May, 1915, this defendant recovered the value of said wood" is an express admission that he did in truth collect the

amount of the judgment. But the defendant insists that there is no evidence of his employment as attorney. Assuming that plaintiff's right of recovery is dependent upon the fact of the employment of the defendant as attorney there is nevertheless some evidence of such employment in addition to the inferences that may be drawn from the averments found in the answer. The satisfaction of the judgment is signed thus: "John Ditchburn atty for Plaintiff H. H. Caples." The Code distinguishes between "attorney" and "counsel," for Section 1074, L. O. L., reads thus:

"An attorney is a person authorized to appear for and represent a party, in the written proceedings in any action, suit, or proceeding, in any stage thereof. An attorney, other than the one who represents the party in the written proceedings, may also appear for and represent a party in court, or before a judicial officer, and then he is known, in the particular action, suit, or proceeding, as counsel only, and his authority is limited to the matters that transpire in the court or before such officer at the time."

Another provision of the Code, Section 1083, subdivision 2, so far as it is material here, defines the authority of an attorney as follows:

"An attorney has authority,— * * 2. To receive money or property claimed by his client in an action, suit, or proceeding, during the pendency thereof, or within three years after judgment or decree, and upon the payment or delivery thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment or decree."

2. There was evidence tending to show that the plaintiff owned a judgment and that the defendant as attorney collected the money due on the judgment. It is admitted that no part of the moneys collected has been paid to the plaintiff. In the absence of an admission

by the plaintiff or evidence by the defendant that the latter owned part of the sum collected the presumption would be that the plaintiff owned all of it. The plaintiff admits, however, that a portion of the moneys collected belongs to the defendant. If the defendant would reduce the amount claimed by the plaintiff or if he would postpone the right of the plaintiff he must do so by offering evidence. The plaintiff was not obliged to anticipate the defenses relied upon by the defendant.

3. Although the complaint alleged that a demand was made upon the defendant and the latter admitted at the trial that no moneys have been paid to the plaintiff, no evidence was offered to show that payment had been demanded of the defendant. The defendant, however, by his answer claims ownership of part of the moneys and justifies his possession and detention of the remainder, and it is obvious, therefore, that a demand would have been a mere idle ceremony. The pleading interposed by the defendant rendered it unnecessary for the plaintiff to offer evidence of a demand: *Rosenau* v. *Syring,* 25 Or. 386, 389 (35 Pac. 845); *Cox* v. *Delmas,* 99 Cal. 104 (33 Pac. 836); *Burrows* v. *McCalley,* 17 Wash. 269 (49 Pac. 508); *Ott* v. *Hood,* 152 Wis. 97 (139 N. W. 762, Ann. Cas. 1914C, 636, 44 L. R. A. (N. S.) 524); 6 C. J. 706.

The plaintiff offered sufficient evidence to entitle him to have his claim submitted to the jury. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED. COSTS RETAXED IN PART.

MR. JUSTICE HARRIS sat for MR. CHIEF JUSTICE MCBRIDE.

MR. JUSTICE BURNETT sat for MR. JUSTICE BEAN.

Allowed in part January 29, 1918.

MOTION TO RETAX COSTS.

(169 Pac. 000.)

On respondent's motion to retax costs. Motion sustained in part.

Mr. Carl M. Mack, for the motion.

Mr. John Ditchburn, in pro. per.

Messrs. Jenkins & Crawford, contra.

Department 2. Opinion PER CURIAM.

The respondent has objected to the cost bill filed by the appellant. It is not necessary to discuss the objections in detail; but it will be sufficient to observe the requirements of Section 570, L. O. L., as construed in *Macleay Estate Co.* v. *Miller,* 85 Or. 623 (167 Pac. 575), and we therefore make an itemized statement of the costs and disbursements now allowed by us as follows: Transcript, $2; printing abstract and briefs, $41; clerk's filing fee, $15; trial fees, $6; costs, $15.

On the authority of *School District No. 30* v. *Alameda Construction Co., ante,* p. 132, the claim of $1.50 for "verification of the cost bill and two affidavits" is disallowed. MOTION SUSTAINED IN PART.

Argued December 20, 1917, affirmed January 29, 1918.

CITY OF PORTLAND *v.* BLUE.*

(170 Pac. 715.)

Judgment—Entry Nunc Pro Tunc.

1. In sewer construction reassessment proceedings, where no judgment was entered upon verdict in Circuit Court, and no order entered except an order discharging the jury, which, under section 179, L. O. L., defining a judgment as the final determination of the parties' rights, is not a judgment, but, on appeal to the Supreme Court, both parties assumed judgment was duly entered, the court could, two years thereafter, enter judgment on the verdict *nunc pro tunc*, notwithstanding Section 201, requiring the clerk to enter judgment on the verdict the day it is returned, for, the law leaving the court no discretion, it operates in lieu of formal action by the court as a direction to the clerk to enter judgment.

Trial—Reassessment Proceedings—Verdict.

2. In sewer construction reassessment proceedings, appealed to Circuit Court, a verdict for plaintiff, assessing benefits to defendants' property "the same as is set forth in" a city ordinance, which was in evidence, was not too indefinite, under the rule of liberal construction of verdicts.

Municipal Corporations—Collection of Special Assessments.

3. Under the Portland charter, it was proper for the Circuit Court, on appeal in sewer construction reassessment proceedings, to direct that a certified copy of the judgment for the city be sent to the city auditor for enforcement by the city of the liens adjudged.

Appeal and Error—Harmless Error—Judgment.

4. Where lack of entry of judgment in lower court was not discovered until after appeal was decided and mandate of appellate court was entered in journal of lower court, the unsuccessful appellants in the first appeal could not, on second appeal, object that the lower court was without power to set aside its order entering the mandate of the appellate court and to incorporate a new order to that effect in its *nunc pro tunc* judgment entry; such action working no injury to appellants, as they admitted liability for costs on prior appeal, and were called on to make but one payment thereof.

Appeal and Error—Objection Below—Apportionment of Costs.

5. In sewer construction reassessment proceedings under the Portland charter, the objection could not be first raised on appeal to the Supreme Court that the Circuit Court erred in giving a joint and several judgment against all the defendants for Circuit Court costs instead of apportioning these costs between the defendants under Portland City Charter, § 402, as to costs in Circuit Court.

From Multnomah: GEORGE N. DAVIS, Judge.

*Authorities discussing the question as to entry of judgment *nunc pro tunc* are collated in a note in 20 **L. R. A.** 143. REPORTER.

Department 2. Statement by MR. JUSTICE MCCAMANT.

A former appeal taken in this cause was heard and determined: See 77 Or. 131 (149 Pac. 548). It is unnecessary to restate the facts set out in the former opinion. The mandate of this court was entered in the journal of the lower court August 6, 1915. Thereafter it was discovered by counsel for the city that the judgment from which defendants had appealed was not entered in the journal. The misprision was called to the attention of the court and on April 13, 1916, a judgment was entered assessing the properties of defendants in the sums specified in Ordinance No. 24,280, a certified copy of which was in the record. Judgment was given in favor of the city and against the defendants and their surety on appeal to the Circuit Court for $193.55, plaintiff's costs in the lower court, and against defendants and their surety on appeal to this court in the sum of $45.30, plaintiff's costs in this court. Defendants appeal from this judgment. AFFIRMED.

For appellants there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. C. L. Whealdon,* with an oral argument by *Mr. Duniway.*

For respondent there was a brief over the names of *Mr. Walter P. La Roche,* City Attorney, and *Mr. Lyman E. Latourette,* Deputy City Attorney, with an oral argument by *Mr. Latourette.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. The verdict of the jury which tried this cause was rendered and filed March 30, 1914. It is claimed that the court was without power to enter judgment on this

verdict April 13, 1916. Authorities are cited to the effect that on the expiration of the term at which a judgment is rendered, the court's control over the judgment lapses. These authorities are without relevancy because in this case no order was entered on the rendition of the verdict except an order discharging the jury. This order was not a judgment: Section 179, L. O. L.

It is provided by Section 201, L. O. L.:

"If the trial be by jury, judgment shall be given by the court in conformity with the verdict and so entered by the clerk within the day on which the verdict is returned."

The statute leaves no discretion in the trial court; its duty is clearly pointed out. The successful litigant should not suffer because the court has neglected to obey this provision of the law. *Actus curiae neminem gravabit.* It is held that where a confession of judgment is filed and there is an omission of the entry of the judgment in the journal, the rights of the judgment creditor will be protected by a *nunc pro tunc* order: *Davidson* v. *Richardson,* 50 Or. 323, 327 (89 Pac. 742, 91 Pac. 1080, 126 Am. St. Rep. 738, 17 L. R. A. (N. S.) 319); *Doughty* v. *Meek,* 105 Iowa, 16 (74 N. W. 744, 67 Am. St. Rep. 282); *Risser* v. *Martin,* 86 Iowa, 392 (53 N. W. 270). In the last of these cases it is said:

"The law operated in lieu of formal action by the court as a direction to the clerk to enter judgment."

We think that this principle is equally applicable to the case at bar. The case falls without the doctrine of *Grover* v. *Hawthorne,* 62 Or. 65, 75 (116 Pac. 100, 121 Pac. 804); *Frederick & Nelson* v. *Bard,* 66 Or. 259, 262 (134 Pac. 318), and *National Council* v. *McGinn,* 70 Or. 457, 461 (138 Pac. 493). The presumption that judgment was rendered in the case at bar is strengthened by defendants' appeal therefrom and by the fact that on

appeal both parties assumed that the judgment was duly entered. It was therefore within the power of the Circuit Court to enter judgment *nunc pro tunc.*

It has been held that the portion of Section 201, L. O. L., quoted above is not mandatory, but directory: *Skelton* v. *Newberg,* 76 Or. 126, 136 (148 Pac. 53); *Fisher* v. *Portland Ry., L. & P. Co.,* 77 Or. 529 (151 Pac. 735). While the judgment in this case was entered after the lapse of a longer time than in the above cases, the defendants have not been prejudiced by the delay. They are taking advantage of the situation to raise on this appeal certain questions which were not mooted on the previous appeal.

The case of *People* v. *Petit,* 266 Ill. 628, 632 (107 N. E. 830), involved the construction of a statute which directed the clerk to enter judgment "before the final adjournment of the term or as soon thereafter as practicable." The statute imposed on the clerk a fine for failure "to enter of record any order by or before the next term after it is rendered." The judge's docket showed that on October 17, 1913, a verdict was received and judgment was ordered on the verdict. This judgment was not entered until December 4th. The verdict had been received at the September term of the court. The October term of the court intervened and no action was taken in the premises. The entry was not made until the December term. The Supreme Court said:

"The penalty for such failure was made to fall upon the clerk by way of fine, and it was not intended that a heavier penalty should fall upon litigants by the loss of the results of their litigation. There is no such limit of time as counsel urge, upon the authority of the clerk to enter the judgments, decrees and orders made by the court."

The court was justified in entering judgment in the case at bar on April 13, 1916.

2. It is next contended that the verdict was too indefinite. The verdict was in the following form:

"We, the jury in the above-entitled cause, find for the plaintiff, and assess the benefits to the property of defendants the same as is set forth in Ordinance No. 24,280 of the City of Portland."

The ordinance referred to had been received in evidence. In *Lew* v. *Lucas,* 37 Or. 208, 212 (61 Pac. 344), Mr. Justice BEAN says:

"A verdict should be construed liberally and not under the technical rules of construction which are applicable to pleadings; and, if the meaning of the jury can be ascertained and the point in issue can be concluded from its verdict the court will, however informally it may be expressed, mold it into form, and make it serve."

In *Consolidated Gold etc. Min. Co.* v. *Struthers,* 41 Mont. 565, 569 (111 Pac. 152), it is said:

"A verdict is not to be technically construed, but is to be given such a reasonable construction as will carry out the obvious intention of the jury. In arriving at this intention, reference may be had to the issues made by the pleadings, the instructions submitted by the court, and the evidence introduced at the trial; and if by a fair and reasonable construction of it, in view of the whole record, the intention of the jury is manifest it should be allowed to stand."

In *Pittsburgh C. C. & St. L. R. Co.* v. *Darlington's Admr.,* 129 Ky. 266, 271 (111 S. W. 360), it is said:

"Courts view the findings of the jury with great leniency, and every reasonable presumption is indulged in aid of a general verdict. The main thing is to get an understanding of what the jury intended. Their intent is to be sought for in the language they used in their verdict, interpreted in the light of the record. Resort may be had to the pleadings or other parts of the record to see what the jury meant by their verdict."

The verdict in this case and the judgment which conforms thereto are sufficient within the rule announced in these authorities.

3. It is contended that the Circuit Court erred in directing that a certified copy of the judgment be sent to the City Auditor for enforcement by the city of the liens adjudged. This practice is approved in *West* v. *Scott-McClure Land Co.*, 84 Or. 296, 301 (164 Pac. 554), and *Elliott* v. *City of Portland,* decided December 27, 1917.

4. Defendants also contend that the lower court was without power to set aside its order entering the mandate of this court and to incorporate a new order to that effect in its judgment entry. It is unnecessary to notice this contention because the action complained of worked no possible injury to defendants. They do not dispute their liability for Supreme Court costs and they are called upon to make but one payment of these costs.

5. It is provided by Section 402 of the Portland charter of 1903, which is still in force and applicable to this proceeding:

"If the judgment assessed by the jury against any appellant be not less than that fixed in the assessment appealed from, the judgment, in addition to declaring the assessment found, shall be entered against such appellant and his sureties for his proportion of the costs of such appeal."

The lower court gave a joint and several judgment against all of these defendants for Circuit Court costs. It is claimed that the costs should have been apportioned between the defendants, but we are not advised of the basis of the apportionment contended for. The record fails to show that this matter was called to the attention of the lower court or that the point relied on is reserved in any way. This circumstance precludes

our consideration of the question: *State* v. *Anderson*, 10 Or. 448; *State* v. *Abrams*, 11 Or. 169 (8 Pac. 327); *United States Mortgage Co.* v. *Marquam*, 41 Or. 391 (69 Pac. 37, 41); *Stoddard Lumber Co.* v. *Oregon-Wash. R. & N. Co.*, 84 Or. 399, 418 (165 Pac. 363).

The judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued October 10, affirmed October 23, 1917, rehearing denied January 8, supplemental petition for rehearing denied February 5, 1918.

COLUMBIA REALTY INVESTMENT CO. *v.* ALAMEDA LAND CO.*

(168 Pac. 64, 440.)

Brokers—Right to Commission.

1. As a general rule, a broker is entitled to its commission when it produces a purchaser with whom the seller made a binding contract of sale; but the rule is subject to modification by the contract of the parties.

[As to when a broker becomes entitled to commissions, see note in 28 **Am. St. Rep.** 546.]

Brokers—Contracts—Construction.

2. A broker's contract for commissions, to be paid on a basis of 20 per cent of the selling price out of the first moneys collected from the sale of lots, entitling the agents to retain out of each payment collected such amount as was then due and payable, but not otherwise, entitles the broker to commission, not at all events, but only out of a specific fund.

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*On effect of contract expressly making broker's right to commissions dependent upon sale of property or other condition beyond that ordinarily implied, see note in 29 **L. R. A. (N. S.)** 533.

As to broker's right to commission, where purchaser is unable to ultimately conclude deal, under special terms of employment of broker, see note in 20 **L. R. A. (N. S.)** 1168, 1172, citing and reviewing *Bush* v. *Abraham*, 25 Or. 336 (35 Pac. 1066), and *Holbrook* v. *Investment Co.*, 30 Or. 259 (47 Pac. 920); also *Riggs* v. *Turnbull*, 105 Md. 135 (66 Atl. 13, 11 **Ann. Cas.** 783, note; 8 **L. R. A. (N. S.)** 824). See, also, note in 44 **L. R. A.** 605; 9 C. J. 594, 632. REPORTER.

Brokers—Commission—Specific Funds.

3. A promise to pay a broker commission out of a specific fund, to be collected by him, is enforceable only on allegations and proof that the fund named is adequate for the payment demanded.

Assignments—Broker's Contract—Right to Commission.

4. Mere fact that a broker, having a contract for commissions to be paid out of a certain fund, to be collected from the sale, assigned his contract, did not give the assignee a right to his commission at all events; but he was entitled only to a commission on the terms on which the broker would have been entitled thereto.

Appeal and Error—Presumptions.

5. In the absence of bill of exceptions containing the testimony, the court on appeal is bound to assume that a finding is supported by competent proofs.

Trial—Reception of Evidence.

6. Where the complaint failed to state facts sufficient to constitute a cause of action, and the affirmative matter in reply was material only as tending to rebut the counterclaim pleaded in the answer, testimony in support of the reply could be received only in rebuttal, and it was not error to reject it as part of plaintiff's case in chief.

Trial—Offer of Proof—Sufficiency.

7. An offer of proof of certain facts upon which plaintiff relied, without naming witnesses or stating the testimony expected to be elicited from them, was insufficient.

Brokers—Actions—Evidence—Admissibility.

8. In a broker's action for commission, to which under his contract he was entitled only if the sale was completed and the price paid, it was competent for the defendant to prove that it canceled contracts held by purchasers who were unable to pay.

Brokers—Actions—Findings—Sufficiency.

9. Where the court found that the broker had received all commissions to which he was entitled, except a certain sum, that all the cancellations of contracts had been necessary, that the expense thereof was a certain sum to be borne under the contract proportionately by the broker and defendant, the findings supported a judgment in defendant's favor for the difference between the commission due and the balance due defendant because of the cancellations, and failure to make additional findings was not error.

ON PETITION FOR REHEARING.

Appeal and Error — Burden to Show Prejudice — Exclusion of Evidence.

10. The presumption being that there was no error when plaintiff's testimony was excluded, the burden was on plaintiff to show that such testimony was admissible, and that its exclusion was prejudicial, in order to work reversal, in view of Section 556, L. O. L., permitting reversal only for errors substantially affecting the rights of the appellant.

Appeal and Error — Presumptions — Recital — Certificate of Offer of Proof.

11. The certification of a bill of exceptions, which recited an offer of proof, did not raise the presumption that the witnesses offered were present and the evidence was properly offered, or import waiver by the trial court of the calling of witnesses.

Trial—Offer of Proof—Sufficiency.

12. An offer of proof should state facts, not conclusions, and its language should be distinct and specific and not vague or general; and it is not sufficient that it state the ultimate facts in language appropriate to a pleading, but it must set out the evidentiary facts.

From Multnomah: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action brought to recover a balance of commissions alleged to be due plaintiff for the sale of parcels of defendant's property in Multnomah County. It appears that on March 9, 1912, the defendant entered into a contract with E. Z. Ferguson and H. L. Hamblet for the sale of the property in question and for the performance of other services. Ferguson and Hamblet were given the exclusive sale of the property for a period of nine months at a schedule of prices attached to the contract as an exhibit. It was provided that sales might be made for cash or on installments. In the latter event at least 10 per cent of the purchase price was to be paid in cash and the balance in monthly installments of at least one per cent of the purchase price, provided that the entire price should be payable within five years. Attached to the contract was a form of sales agreement which provided that on default of the purchaser in making the stipulated payments his contract could be forfeited.

The contract of defendant with Ferguson and Hamblet provided that in case the latter should sell $25,000 worth of property within six months they

should be entitled to an extension of three months on their sales contract:

"It being further expressly understood and agreed that if said total amount of said sales does not aggregate the full amount of Twenty-five Thousand Dollars ($25,000.00) within a period of six months from the date hereof as aforesaid, that then and in that event the selling agency shall immediately terminate and be at an end, and said Agents shall have no further interest or right in or to or under this contract, except that they shall be entitled to their commission theretofore earned by them for selling lots hereunder as aforesaid, the same to be paid when collected by said Company; and in any event this contract and all rights hereunder, except as to the commissions earned, and in the event said contract shall be extended as aforesaid, shall terminate within nine (9) months from the date hereof and all rights of said Agents shall thereupon absolutely cease and determine."

It is probable that the parties originally contemplated only a six months' contract, which was to be extended if the agents sold the specified amount of property. As finally drawn, the contract covered a period of nine months at all events and contained the foregoing provision for its extension.

The compensation of the agents was covered by the following stipulations:

"Said Agents shall receive in full payment for their services under this agreement, commissions upon the selling prices set forth in said Exhibit 'C' as aforesaid, as follows:

"A total commission of twenty-five per cent (25%) on all sales made by or through said Agents, which said twenty-five per cent (25%) commission shall be divided as follows: Twenty per cent (20%) for selling said property and five per cent (5%) for collecting the purchase price and attending to the general affairs of the Company as hereinafter set forth. Said commissions shall be paid as follows: said Agents shall be en-

titled to take and receive a sum equal to twenty per cent (20%) of the selling price as aforesaid, out of the first moneys collected from the sale of each and every lot sold under this agreement. The remaining five per cent (5%) of said selling price shall be paid as follows: two and one-half per cent (2½%) shall be paid when the purchaser has paid not less than twenty-five per cent (25%) of the said selling price of said lot, and two and one-half per cent (2½%) when said Agents have complied with all the terms and conditions of this agreement; provided, however, that said Agents may, at any time after fifty per cent (50%) of said selling price has been paid, upon furnishing said Company a good and sufficient bond with approved securities in an amount satisfactory to said Company, be entitled to withdraw said last-mentioned two and one-half per cent (2½%); said bond to be conditioned on their faithful compliance with all the terms, conditions and covenants of this agreement, except that said bond will not guarantee the selling of said property."

"Said Agents may retain out of each payment collected by them such amount, as herein provided, as may be then due and payable to them as commission aforesaid, but not otherwise, and said Agents must, upon demand of the Company, pay over to said Company all moneys collected by them as such agents less any commission retained by them out of such payments under authority of this agreement, and deliver with each payment so made to said Company a full and true itemized statement of the collection included therein and the commission retained out of such collection."

After other provisions, immaterial for present purposes, the contract recited:

"It is further agreed that the President and Secretary of said Company and Mr. O. L. Ferris of the Columbia Trust Company of Portland, Oregon, are hereby appointed a committee or board of arbitrators, with authority from time to time to raise the selling price of lots marked on said schedule 'C' as in their

judgment may seem best, and that such raise in price or value, that is to say: the amount over and above the present selling price as set forth in said schedule 'C,' not including the increase on account of city liens, shall, on all property sold, be divided equally, share and share alike, between said Agents and said Company, as a further commission to said Agents, provided that said additional commission shall not be paid until said Company has received fifty per cent (50%) of the purchase price of the lot or lots so sold, when it shall be paid upon demand to said Agents."

On the same day that the above contract was entered into, Ferguson and Hamblet assigned to plaintiff the exclusive right to sell the property for the time stated and to receive the commission of 20 per cent provided therefor, the assignors retaining their other rights under the contract. Defendant assented to the assignment.

The complaint alleges the incorporation of the parties, the making of the foregoing contract, which was attached as an exhibit to the complaint, and the assignment from Ferguson and Hamblet to plaintiff. It is alleged that plaintiff effected sundry sales under the contract and that there are due and unpaid to plaintiff commissions on such sales aggregating $2,619.36. The complaint lists the property sold, the names of the purchasers and the unpaid commissions on each of these sales.

The answer admits the incorporation of the parties, the making and assignment of the contract and the negotiating of the sales specified in the complaint. The other allegations of the complaint are denied. It is affirmatively alleged that the sales contract contained the following provision:

"It is further understood and agreed that in the event that it shall become necessary to cancel any of

the contracts for sale on the installment plan, the expense of such cancellation and foreclosure of such contracts shall be borne by the company and said agents in proportion to the amount that each shall have received on account of said sale."

The answer alleges that it was necessary to cancel and foreclose many of the contracts; that defendant's expense in that regard was $351.55, and that an apportionment of that sum in the manner provided by the contract would charge plaintiff with $309.26. The answer set up the amount paid by the purchasers on account of each piece of property sold and the disposition of these sums as between plaintiff and defendant. The answer alleged that plaintiff had received $222.19 in excess of commissions earned and judgment was asked for this sum and for $309.26.

The reply admits that the contract contained the provision quoted in the answer and except in the case of one lot admits that the amounts received by plaintiff were as stated in the answer. The reply takes issue with the allegations of the answer as to the amounts paid by the purchasers and denies that it was necessary to cancel any of the contracts.

As an affirmative reply to defendant's counterclaim, plaintiff alleges that the prices of the lots had been raised by mutual consent and that a market had been created for them by plaintiff's efforts; that defendant thereupon divided the unsold lots among its stockholders and that these stockholders offered the lots for sale at prices so low that previous purchasers were able to forfeit existing contracts and save money by buying lots equally desirable at the new prices. It is alleged that:

"If any contracts were forfeited or canceled, or if any purchasers failed to carry out their agreements

which they had executed upon the sale of lots to them through the plaintiff corporation, it was by reason of the defendant corporation having knowingly and wrongfully thrown upon the open market its lots at greatly reduced prices, as hereinabove set forth, and thus making it profitable for the said purchasers to seek to have their contracts canceled and annulled."

The reply alleges that plaintiff's commission should be based on the purchase price of the property sold by contract without regard to cancellations or defaults and it is averred that the misconduct of defendant should estop it from resisting this claim.

It appeared that shortly before the expiration of the nine months' period covered by the contract the parties agreed to raise the prices of the unsold lots and some lots were sold by plaintiff at the higher prices.

The case was tried by the court without the intervention of a jury. The material findings of the lower court were these:

"That the plaintiff entered upon the work of selling the lots mentioned in said agency contract between said defendant and said Ferguson and Hamblet, and hereinafter referred to as the 'Agency Contract,' and among other lots sold by it, the plaintiff did sell the lots mentioned and described in paragraph six of the first cause of action in the complaint of the plaintiff herein, and the court finds that the practice adopted by the parties hereto, in the matter of the payment of commissions was to pay plaintiff out of the first money received on the purchase price of a lot sold by plaintiff, twenty per cent of the price for which it was sold, whether sold for the list price or for a higher price, and after the defendant had been paid fifty per cent of the purchase price, out of the first money thereafter collected the plaintiff was paid thirty per cent of the sum for which the lot sold in excess of the list price, if it was sold for any amount in excess thereof, and

the Court finds that on this basis or practice of computing and paying commissions the plaintiff had been paid all commissions earned by it at the time this action was instituted, excepting the sum of $65.16, which sum was then due it for commissions earned by it and unpaid.

"The Court also finds as a fact that it became necessary to cancel and foreclose certain contracts of sale made and procured by plaintiff of lots in the list attached to the agency contract aforesaid, because of the failure and refusal of the purchasers to make payment of the installments stipulated to be paid on account of the purchase price, and that the cost and expense of such cancellations and foreclosures aggregate the sum of $351.55, and that defendant had received on account of the purchase price of the lots, the contracts for which were canceled and foreclosed, the sum of $268.18, and plaintiff had received on account of the sale of such lots the sum of $2,081.67, and that defendant, having paid the total cost and expense of such cancellations and foreclosures, is entitled to recover of and from the plaintiff its proportion thereof, namely, the sum of $309.26, less the sum of $65.16 due plaintiff for commissions as above found, making the amount which the defendant is entitled to recover from the plaintiff $244.10."

The conclusions of law and judgment were in accord with these findings and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Loyal H. McCarthy* and *Mr. J. Le Roy Smith,* with an oral argument by *Mr. McCarthy.*

For respondent there was a brief over the name of *Messrs. Fulton & Bowerman,* with an oral argument by *Mr. Charles W. Fulton.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. Plaintiff contends that when it produced a purchaser with whom defendant made a binding contract of sale, it earned its commission of 20 per cent of the purchase price and its right to this commission was not lost by the default of the purchaser or the cancellation of his contract. This is the general rule: *Stewart* v. *Will*, 65 Or. 138, 140, 141 (131 Pac. 1027). But it is subject to modification by the contract of the parties. The material question here is whether the contract on which plaintiff relies contains a promise to pay commissions at all events or only out of a specified fund, to wit, the amounts paid by the purchasers. It is provided in paragraph 1 that in default of the extension tentatively provided for the agency should terminate "except that they (the selling agents) shall be entitled to their commission theretofore earned by them * * , the same to be paid when collected by said company."

In the second paragraph the contract specifies the commissions of the agents and provides:

"Said commissions shall be paid as follows: said agents shall be entitled to take and receive a sum equal to twenty per cent of the selling price aforesaid, out of the first moneys collected from the sale of each and every lot sold under this agreement."

The foregoing language plainly suggests an intent of the parties to pay commissions out of the moneys collected from the purchasers of the property. This intent is emphasized by the absence from the contract of an express promise of defendant to pay the commissions. Further light is thrown on the intent of the parties by the following language, found in paragraph 3:

"Said Agents may retain out of each payment collected by them such amount, as herein provided, as may be then due and payable to them as commission aforesaid, but not otherwise."

The language means that the agents are entitled to retain out of the moneys collected on each sale, such sum as shall suffice to pay the commission earned on that sale. They are not entitled to charge to defendant all commissions earned by all sales effected and retain out of their collections all moneys standing to their credit in such account. It affirmatively appears from the form of agreement attached to the sales contract that the parties contemplated that some of the purchasers would fail to make the monthly payments called for and that some of these agreements of purchase would have to be canceled. The sales contract makes provision for the apportionment between the parties of the expense incident to such cancellations.

In paragraph 8 there is provision for raising the prices of the lots and it is provided that:

"The amount over and above the present selling price * * shall, on all property sold, be divided equally, share and share alike, between said Agents and said Company as a further commission to said Agents, provided that said additional commission shall not be paid until said Company has received fifty per cent (50%) of the purchase price of the lot or lots so sold, when it shall be paid upon demand to said Agents."

2, 3. It may be conceded that the language of this contract is not well chosen to effect the purpose in view, but we think the intent of the parties sufficiently appears that plaintiff was to be paid commissions not at all events, but only out of a specific fund. Such a promise to pay is enforceable only on allegations and

proof that the fund named is adequate for the payment demanded: *Owen* v. *Lavine,* 14 Ark. 389, 396; *Waters* v. *Carleton,* 4 Port. (Ala.), 205; *National Sav. Bank* v. *Cable,* 73 Conn. 568, 572 (48 Atl. 428); *Fulton* v. *Varney,* 117 N. Y. App. Div. 572, 576 (102 N. Y. Supp. 608); *Morrison* v. *Austin State Bank,* 213 Ill. 472, 487 (72 N. E. 1109, 104 Am. St. Rep. 225, 233); *Kelly* v. *Bronson,* 26 Minn. 359, 360 (4 N. W. 607); *Welch* v. *Mayer,* 4 Colo. App. 440, 443 (36 Pac. 613, 614.)

It is held specifically that a real estate broker cannot recover commissions payable out of the purchase price without proof that enough of the purchase price has been paid to cover the commissions claimed: *McPhail* v. *Buell,* 87 Cal. 115 (25 Pac. 266); *Lindley* v. *Fay,* 119 Cal. 239, 243 (51 Pac. 333); *Boysen* v. *Frink,* 80 Ark. 254, 258 (96 S. W. 1056). Plaintiff cites *Hugill* v. *Weekley,* 64 W. Va. 210 (61 S. E. 360, 15 L. R. A. (N. S.) 1262), and *Cheatham* v. *Yarbrough,* 90 Tenn. 77, 80 (15 S. W. 1076). These were cases in which the brokers had produced purchasers able, ready and willing to buy and the sales were defeated through the fault of the owners. In the West Virginia case the purchaser refused to buy because the representations of the owner were not borne out by an examination of the property, and in the Tennessee case there was a substantial defect in the title. The question involved in the case at bar was not determinative of either of these controversies.

4. Plaintiff claims that as the assignment to it of a part of the sales contract left the collections wholly in the hands of Ferguson and Hamblet, plaintiff's rights are unaffected by the failure to collect the installments due from purchasers. A stream cannot rise higher than its source. We have seen that the contract pro-

vides only for a conditional payment of these commissions. Such being its effect as between the original parties, the stipulation for payment could not become absolute by the assignment to plaintiff.

5. Plaintiff's complaint contains no allegation that the fund to which plaintiff was to look for payment of the commissions claimed was adequate for such purpose and the finding of the lower court was that there was no fund applicable to such payment except $65.16. The testimony has not been attached to the bill of exceptions and we are therefore bound to assume that this finding is supported by competent proofs.

6. Plaintiff complains that the lower court refused to receive a number of specifications of evidence offered in plaintiff's case in chief. This testimony all went to support the plea of estoppel set up in the reply. The complaint failed to state facts sufficient to constitute a cause of action for the reasons above stated. The affirmative matter in the reply was material, therefore, only as tending to rebut the counterclaim pleaded in the answer. The testimony in support of these allegations of the reply could be received only in rebuttal and the court did not err in rejecting the proof as a part of plaintiff's case in chief.

7. In rebuttal plaintiff made the following offer:

"The plaintiff at this time offers to produce witnesses and prove that the cancellation of the contract —that all the cancellations of contracts which have been referred to in the case are the result of an interference by the Alameda Land Company in the way of dividing lots up among the stockholders prior to the expiration of the contract, throwing the same upon the market at prices away below the prices at which the Columbia Realty Company was authorized to sell the same; so that it was profitable for the purchasers to surrender the contracts and forfeit the moneys which they had paid upon the same, whereupon they

could repurchase the lots and still save money by doing so; and by the actual presence of stockholders upon the tract offering the lots at these reduced prices, some of the same lots which the Columbia Realty Company was trying to sell, and at a time prior to the expiration of their contract; that is, during the month of November, 1912."

Defendant contends that an offer of proof cannot be made without calling a witness and asking an appropriate question. In support of this contention we are cited to: *Ralston* v. *Moore,* 105 Ind. 243 (4 N. E. 673, 675); *Smith* v. *Gorham,* 119 Ind. 436 (21 N. E. 1096, 1097); *Tobin* v. *Young,* 124 Ind. 507 (24 N. E. 121, 123); *Darnell* v. *Sallee,* 7 Ind. App. 581 (34 N. E. 1020, 1021); *Gray* v. *Elzroth,* 10 Ind. App. 587 (37 N. E. 551, 552, 53 Am. St. Rep. 400). These authorities are in point and they are supported by the opinion of Mr. Justice MOORE in *First National Bank* v. *Oregon Paper Co.,* 42 Or. 398, 402 (71 Pac. 144, 971). In this opinion it is said:

"If the appellants were not allowed to prove their claim, they should have called witnesses, and stated to the court the testimony which it was expected would be elicited from them."

Plaintiff relies on this branch of the case on *Scotland County* v. *Hill,* 112 U. S. 183, 186 (28 L. Ed. 692, 5 Sup. Ct. Rep. 93). This case undoubtedly tends to support plaintiff's contention, but the offer of proof in that case was much more specific than in this. The name of the witness relied on was given and the precise testimony relied on was stated in the offer. In the case at bar no witness was named and the offer of proof was couched in the most general terms. We think that plaintiff should have named its witnesses and specified the acts of interference relied on. The

offer should have named the contracts of purchase which were canceled because of each act of interference by the defendant. Unless the calling of witnesses is waived by the court or by the adverse party, we think the better practice is to call the witnesses relied on and ask appropriate questions. If objections are sustained to these questions the time is ripe for an offer of proof. The court did not err in declining the offer in question.

8. Plaintiff's objection was not well taken to defendant's testimony showing that purchasers had failed to make their payments. It was competent for the defendant to prove by the witness Bosworth the practice of the defendant in canceling contracts held by purchasers who were unable to meet their obligations. We cannot say as a matter of law that these cancellations required formal action by the board of directors of the defendant.

9. It is finally contended that the lower court erred in refusing to make findings on some of the material issues raised by the pleadings. The court found that plaintiff had received all the commissions to which it was entitled except $65.16; that all the cancellations of contracts had been made as alleged; that the expense of such cancellations was $351.55, of which $309.26 was chargeable to plaintiff, and that all of these cancellations were necessary. These findings support a judgment in defendant's favor for $244.10. The finding that the cancellations were necessary negatives plaintiff's claim that the cancellations were due to defendant's unwarranted interference with the purchasers secured through plaintiff's efforts. The findings therefore determined the controversy and support the judgment. In such case the failure to make additional findings is not error: *Lewis* v. *First Nat. Bank,*

46 Or. 182, 188 (78 Pac. 990); *Freeman* v. *Trummer*, 50 Or. 287, 290 (91 Pac. 1077); *Naylor* v. *McColloch*, 54 Or. 305, 315, 316 (103 Pac. 68); *Wells* v. *Great Northern Ry. Co.*, 59 Or. 165, 175 (114 Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818).

The judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Denied January 8, 1918.

ON PETITION FOR REHEARING.

(168 Pac. 440.)

On petition for rehearing. Denied.

Mr. Loyal H. McCarthy and *Mr. J. LeRoy Smith*, for the petition.

Messrs. Fulton & Bowerman, contra.

Department 2. MR. JUSTICE MCCAMANT delivered the opinion of the court.

We have given mature consideration to the exhaustive petition for a rehearing which plaintiff has filed. It is directed to so much of our opinion as sustains the action of the trial court in rejecting plaintiff's offer of proof on rebuttal. We held the offer was properly rejected because no witness was on the stand to whom appropriate questions were asked, and also because the offer was couched in general terms and failed to specify the facts to be proved.

10. Plaintiff claims that these grounds of objection are untenable because the offer in the lower court was objected to only on the general ground that the testi-

mony offered was incompetent, irrelevant and immaterial. Many authorities are cited to the effect that when testimony is admitted over this general objection, the appellate court will not review an assignment of error based thereon unless the testimony is obviously inadmissible for any purpose. This principle is well established and is recognized by our own decisions: *State* v. *Martin*, 47 Or. 282, 292 (83 Pac. 849, 8 Ann. Cas. 769); *Hildebrand* v. *United Artisans*, 50 Or. 159 (91 Pac. 542); *Ferrari* v. *Beaver Hill Coal Co.*, 54 Or. 210, 222 (94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016). In the case at bar, however, the testimony was excluded. The presumption is that there was no error and the burden therefor devolves on plaintiff to show that the testimony offered was admissible, and that plaintiff was prejudiced by its exclusion. In 1 Wigmore on Evidence, page 59, the rule is stated thus:

"When a general objection is sustained by the trial court, it may be presumed that the reasons were apparent to all parties without statement; and as the exception is here to be taken by the proponent of the evidence, it is fair to require him to make clear therein the basis of his claim for its admissibility, if he had rested on any specific ground; hence, the general objection will suffice, if on the face of the evidence and the rest of the case there appears to be any ground of objection which might have been valid (or, otherwise stated, if there is any purpose for which the evidence would conceivably be inadmissible)."

In 5 Jones on Evidence, 377, it is said:

"The rule that the objection should be specific has no application, however, where a general objection is sustained; in that case, the party against whom the ruling was made cannot urge that objection as too general."

The text quoted is supported by the following adjudications: *Tooley* v. *Bacon*, 70 N. Y. 34; *Baldwin* v.

Threlkeld, 8 Ind. App. 312 (34 N. E. 851, 35 N. E. 841); *Leach* v. *Dickerson,* 14 Ind. App. 375 (42 N. E. 1031); *Haas* v. *C. B. Cones & Son Mfg. Co.,* 25 Ind. App. 469 (58 N. E. 499); *Rosenberg* v. *Sheahan,* 148 Wis. 92 (133 N. W. 645); *Hurlbut* v. *Hall,* 39 Neb. 889 (58 N. W. 538, 540); *People* v. *Graham,* 21 Cal. 261, 266; *Spottiswood* v. *Weir,* 80 Cal. 448 (22 Pac. 289). The industry of counsel for plaintiff has discovered some cases to the contrary, as *McKinnon* v. *Johnson,* 57 Fla. 120 (48 South. 910), and *Rush* v. *French,* 1 Ariz. 99 (25 Pac. 816, 824). These cases are out of harmony with the weight of authority and we are forbidden by our statute from following them. Section 556, L. O. L., provides that a judgment "shall only be reversed or modified for errors substantially affecting the rights of the appellant." The rights of an appellant are not injuriously affected by the exclusion of inadmissible testimony, even though the objection reserved thereto is too general or is otherwise inadequate.

11. Several additional authorities are cited to the effect that when the trial court settles a bill of exceptions reciting the offer of proof, it will be assumed on appeal that the witnesses were present and the evidence was properly offered; for example, *Biddick* v. *Kobler,* 110 Cal. 191, 196 (42 Pac. 578), and *Tathwell* v. *Cedar Rapids,* 114 Iowa, 180 (86 N. W. 291). We do not think that the certification of a bill of exceptions should be given the effect contended for. It is the practice in this state to incorporate in a bill of exceptions the objections to questions and the offers of proof in language taken from the reporter's transcript and a trial court refusing so to do would be regarded as unfair to the unsuccessful litigant. The certification of the bill does not import a waiver by the trial court of the calling of witnesses in connection with an offer of proof. The

rule announced on the subject in the former opinion is supported by the following additional authorities: *Eschbach* v. *Hurtt,* 47 Md. 61, 67; *Chicago City R. Co.* v. *Carroll,* 206 Ill. 318, 328, 329 (68 N. E. 1087); *Stevens* v. *Newman,* 68 Ill. App. 549, 552; *Robinson* v. *State,* 1 Lea (69 Tenn.), 673. The reasons for insisting on the calling of witnesses and propounding suitable questions are stated in the first two cases cited.

There can be no doubt that the offer of proof was properly rejected on the ground that it was general in terms and did not specify the evidence available. In *Reynolds* v. *Continental Ins. Co.,* 36 Mich. 131, 144, Mr. Justice GRAVES says:

"In submitting propositions of proof it is requisite that counsel should be distinct and clear. A proposition should embody the specific fact or facts in such connection and in such terms as to be apprehended and ruled in the intended sense by the trial judge, and be examined and applied in the appellate court in the proper light to test the accuracy of the ruling if an adverse one. * * The facts proposed ought to be indicated with sufficient clearness in regard to identity and sense to enable the court and adverse counsel to judge intelligently concerning their admissibility."

In 9 Enc. Evidence, 165, it is said:

"In making an offer to prove it is requisite that counsel should be distinct and clear. The offer should embody the specific fact or facts in such connection and in such terms as to be apprehended and ruled upon in the intended sense by the trial judge, and be examined and applied in the appellate court in the proper light to test the accuracy of the ruling, if adverse. A mere general proposition in so many words to make out the case set forth in the pleadings is not one that the court is bound to take into consideration and rule upon as an offer of proof."

This rule is supported by the following authorities: *Harmon* v. *Decker,* 41 Or. 587, 592 (68 Pac. 11, 1111,

93 Am. St. Rep. 748); *Van Arsdale* v. *Buck,* 82 App. Div. 383 (81 N. Y. Supp. 1017, 1019); *Matter of Bateman,* 145 N. Y. 623 (40 N. E. 10); *Middleton* v. *Griffith,* 57 N. J. L. 442 (31 Atl. 405, 408, 51 Am. St. Rep. 617); *Lewis* v. *Nenzel,* 38 Pa. St. 222, 225; *Reeves* v. *McComeskey,* 168 Pa. St. 571 (32 Atl. 96); *Cole* v. *High,* 173 Pa. St. 590 (34 Atl. 292, 294); *Bland* v. *O'Hagan,* 64 N. C. 471, 473; *Carlton* v. *State,* 8 Heisk. (55 Tenn.) 16; *Dwyer* v. *Rippetoe,* 72 Tex. 520 (10 S. W. 668, 673, 674); *Russell* v. *Lake,* 68 Ill. App. 440, 441; *Lyon* v. *Batz,* 42 Mo. App. 606, 618; *Wolfard* v. *Farnham,* 47 Minn. 95 (49 N. W. 528, 529); *Pendleton* v. *Smissaert,* 1 Colo. App. 508 (29 Pac. 521, 523); *Palmer* v. *McMaster,* 10 Mont. 390 (25 Pac. 1056, 1058); *Kennedy* v. *Currie,* 3 Wash. 442 (28 Pac. 1028, 1031); *Johnson* v. *Merry Mount Granite Co.,* 53 Fed. 569, 571.

12. An offer of proof should state facts rather than conclusions. Its language should be not vague, but distinct; not general, but specific. It is not sufficient that it state the ultimate facts in language appropriate to a pleading; the evidentiary facts must be set out.

In the instant case plaintiff's offer should have named the witnesses relied on; it should have identified the contracts of purchase surrendered as the result of the defendant's interference; the acts of interference causing the surrender of each contract should have been specified and the parties responsible for these acts should have been named.

A departure from the principles announced in the former opinion would establish a dangerous procedure not justified by reason or authority. The petition for rehearing is denied. AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

NOTE.—Supplemental petition for rehearing was denied February 5, 1918, without a written opinion. REPORTER.

Argued January 23, affirmed February 5, 1918.

WATSON *v.* HURLBURT, SHERIFF.

(170 Pac. 541.)

Homestead—Extent of Right in City Property—Improved Lot Worth More Than $1,500—Statute.

1. Under Section 221, L. O. L., providing that the homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment, and such homestead must be the actual abode of, and owned by, the family or some member, and under Section 222, providing the homestead shall not exceed $1,500 in value, nor 160 acres, if not located in town or city laid off into blocks and lots, in which case it shall not exceed one block, but that in no instance shall such homestead be reduced to less than 20 acres, or one lot, regardless of value, despite Sections 224 and 225, relating to the procedure to secure and confirm the homestead right, a husband and wife had right of homestead exempt from execution in their city property, comprising one lot with the house thereon, worth in excess of $1,500; that is, about $15,000.

Homestead—"One Lot"—Statute.

2. Homestead property in a city, consisting of approximately adjacent halves of two lots in a block irregular in shape and not of uniform size, being 50 feet in width on one street and 50.12 feet on another, the same as the lots in that part of the block, consisted of a "single lot" within the homestead statute (Sections 221, 222, L. O. L).

Homestead—Construction of Homestead Laws.

3. Homestead laws are remedial in their nature, and should be liberally construed to effect their purpose.

Homestead—Notice of Claim of Exemption—Efficacy.

4. Where property of husband and wife was attached October 23d, and October 24th the husband served on the levying officer a notice of claim of exemption as homestead as the actual abode of himself and family, such notice was prompt and timely, and not rendered insufficient or lessened in force because the wife, on behalf of the family, served a similar notice after the court had ordered sale of the attached property.

Homestead—Waiver—Failure to Appear in Action.

5. There was no waiver of the right of homestead by the failure of the husband who claimed it to appear in the action against him wherein the property was attached, and to object to the order of sale of the homestead property.

Constitutional Law—Homestead—Grant of Special Privileges—Homestead Law.

6. The homestead statute (Sections 221, 222) is not violative of Article I, Section 20, of the Constitution, as granting privileges or immunities to one citizen which under the same terms would not belong to all, because, as construed, a debtor claiming homestead living in

an addition where city lots are platted 25 by 100 feet, and his neighbor, just over the line, residing in an addition where the lots are platted 100 by 100 feet, would be on an unequal footing, in that each would be entitled to a homestead exemption of one lot irrespective of value.

Homestead—Absence of Husband and Head of Family.

7. The law will not deprive a family, consisting of husband and wife, of a homestead on the ground that the property is not occupied as such within the intent of the homestead law, merely because the husband and head of the family is absent on business in another state, or away temporarily for other reasons.

[As to who is head of the family and what constitutes a family, see notes in 61 **Am. Dec.** 586; 70 **Am. St. Rep.** 107.]

From Multnomah: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

The defendants, W. N. Daniels and J. Q. Daniels, partners under the firm name of La Grande Creamery Co., commenced an action in the Circuit Court for Multnomah County against the plaintiff, D. M. Watson, to recover $2,430.30 upon an account and on October 22, 1913, attached the real property involved in this suit. On October 24, 1913, D. M. Watson, defendant in that action, caused to be served upon the sheriff a notice of claim of homestead exemption. Thereafter on July 1, 1914, the firm obtained a judgment by default in their favor against D. M. Watson for $2,430.30, with interest and costs, and an order that the real property attached in the action be sold to satisfy the judgment, interest and costs, and that execution issue therefor. On May 10, 1916, an attachment execution was issued upon the judgment and was placed in the hands of the defendant, T. M. Hurlburt, sheriff, commanding him to make sale of the attached premises in accordance with said execution, judgment and order of sale. The real property attached was duly advertised for sale to take place on June 26, 1916. While this property was being advertised for sale and

on June 23, 1916, the plaintiff, Annie M. Watson, served upon the defendant, T. M. Hurlburt, a homestead notice claiming the property as the actual abode of the plaintiffs and as exempt. On June 24, 1916, two days before the sale was advertised to take place this suit was commenced to enjoin the sheriff from making such sale. The plaintiffs here claim the property in question to be exempt from execution sale as a homestead under the statutes of this state.

To the complaint the defendants answered denying that the plaintiffs, as husband and wife, or as a family, reside upon the premises. As a further and separate defense they averred in effect that the property consists of a portion of two separate and distinct lots having a frontage of 50 feet on the Cornell road, extending approximately 130 feet through to Summit Avenue in the City of Portland and having a frontage there of 50.12 feet; that the property is improved with a dwelling-house which cost over $9,000; that the land and dwelling are of the value of $15,000; that there is no uniformity in size or value of the lots platted in the city ranging from 25x100 feet to more than an acre, and in value from a few hundred dollars to $100,000; that blocks in the city range from 2,500 square feet to several acres in area. The answer sets forth in full all the proceedings in the original action consisting of the attachment of the real property in question, the judgment in favor of the La Grande Creamery Company, the order for the sale of the attached property, the issuance of the attachment execution and the advertisement for the sale of the property. The defendants in their answer tendered to plaintiffs the sum of $1,500 in satisfaction of their homestead rights in the realty.

Plaintiffs demurred to the further and separate answer. The court sustained the demurrer, after which testimony was taken on the issues. The court made findings of fact and conclusions of law in favor of the plaintiffs to which defendants objected and requested findings in their favor. The court passed a decree enjoining the sale of the property upon execution. Defendants appeal assigning error. AFFIRMED.

For appellants there was a brief over the name of *Messrs. Wilson, Neal & Rossman,* with an oral argument by *Mr. Oscar A. Neal.*

For respondents there was a brief over the name of *Messrs. Manning, Slater & Leonard,* with an oral argument by *Mr. Woodson T. Slater.*

MR. JUSTICE BEAN delivered the opinion of the court.

1. Counsel for the defendants contend that the real property is not exempt as a homestead under the statute, except to the amount of $1,500 in value, and that the trial court erred in sustaining the demurrer to defendants' further and separate answer. Counsel for plaintiffs submit that a tract of land in a city, which does not exceed in area one city lot, having improvements thereon, although it exceeds in value $1,500, is exempt. The case involves the construction of the homestead exemption law. The title of the act reads:

"An Act to exempt homesteads from attachment and judicial sale": Sess. Laws 1893, p. 93.

The first two sections are as follows:

Section 221, L. O. L. "HOMESTEADS EXEMPT. MUST BE ACTUAL ABODE. The homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained. Such homestead must

be the actual abode of, and owned by such family, or some member thereof."

Section 222, L. O. L. "EXTENT OF HOMESTEAD EXEMPTION. Such homestead shall not exceed $1,500 in value, nor exceed one hundred and sixty acres in extent, if not located in town or city laid off into blocks and lots; if located in any such town or city, then it shall not exceed one block; but in no instance shall such homestead be reduced to less than twenty acres nor one lot, regardless of value."

The first section decrees, without qualification, that the homestead which is the actual abode of and owned by a family or some member thereof shall be exempt. Section 2 limits the extent of the exemption. The closing words of this section are a distinct and unqualified command that in no instance shall a homestead be reduced to less than twenty acres nor one lot, *regardless of value.* Thus far the act establishes the substantive right and the extent thereof. Giving to each part of the act its appropriate meaning so that each section will perform the office intended, there is no provision in conflict with the clause referred to. Sections 224 and 225, L. O. L., relate to the procedure to secure and confirm the right previously granted. Section 224 gives directions, when a levy is made upon such homestead, for notice to the officer that the owner claims the premises as a homestead, whereupon such officer shall notify the creditor. Provision is then made that "if such homestead shall exceed the minimum in this act," that is, if the area of the homestead exceeds twenty acres of land or one city or town lot, then if the creditor "deem it of greater value than $1,500," he may proceed under either of the latter sections and direct the sheriff to select three disinterested householders to appraise such homestead, commencing with the twenty acres or lot upon which the dwelling

is located, appraising such lot or twenty acres separately,

"and if the same exceed $1,500, then the sheriff shall proceed to sell all in excess of $1,500 by lots or smallest legal subdivisions, offering them in the order directed by the judgment debtor, if he chooses to direct; otherwise, he shall sell the same as aforesaid, so as to leave the homestead as compact as possible."

The directions contained in the latter section are somewhat involved and tend to obscure the meaning of the other part of the act. When we notice that the conditions upon which the provisions for an appraisement and sale are made applicable are that "if such homestead shall exceed the minimum in this act, and he deem it of greater value than $1,500," it is evident that the language of Sections 224 and 225 does not overcome the plain and unambiguous provision of Section 222, that "in no instance shall such homestead be reduced to less than twenty acres nor one lot, regardless of value." Section 225 merely provides for an alternative method of procedure based upon the same conditions as to area and value as prescribed in Section 224. In the event that a homestead exceeds the defined limit of extent and value and such excess cannot be practicably sold separately, the whole may be sold, adding $1,500 to the lien and that amount of money be exempt. The function of Sections 224 and 225 is to provide a means of procedure for a creditor to avail himself of the benefit of the excess when, and only when, the homestead claimed exceeds in area and also in value the limit prescribed by Section 222. The former two sections were not intended to limit or declare the right conferred by the latter. It was obviously the primary legislative intent, as the title of the act suggests (see 36 Cyc. 1134), to grant an ex-

emption of the home of the debtor, to the extent of twenty acres of land, or one town lot, together with a dwelling-house thereon, regardless of the value of the property. Such homestead may be greater in extent when the same does not exceed $1,500 in value or 160 acres of land or one block: *In re Barde,* 225 Fed. 715 (140 C. C. A. 589). In the latter case the statute in question was construed by Judge BEAN of the United States District Court and by the Circuit Court of Appeals. The able opinion of the latter court was written by District Judge VAN FLEET. Our investigation leads to the same determination. For more than twelve years the imperative of the lawmakers, which leaves no option, has remained in the latter part of Section 222 without change. Any hardship or inequality which may be worked by the enforcement thereof must be prevented by legislative command. In the case at bar the homestead claimed does not exceed one lot or extend beyond the limit defined in Section 222; therefore, the incongruous provisions of the succeeding sections are not directly involved. There is no excess to be sold. There was no error in sustaining the demurrer.

2, 3. It is contended on behalf of defendants that the homestead in question does not constitute only one lot within the meaning of the statute and is not exempt under any construction of the law. This claim is made for the reason that the boundaries of the homestead are not identical with the lines of the lots; or that the premises are not within the limits of a single lot. The homestead claimed is approximately adjacent halves of lots 4 and 5 in block 1 of Fordham Addition to the City of Portland, which addition consists of two blocks. These are irregular in shape and are not of uniform size; so also are the lots. The land claimed by plain-

tiffs is 50 feet in width on one street and 50.12 on another, the same as the lots in that part of the block. It is not quite rectangular, the length of the sides varying slightly. Lots 4 and 5 are of about an average size. It may be fairly said that the homestead does not exceed one lot, taking as a standard the other lots in the Addition. The statute does not require that the homestead shall constitute but one lot. "The actual abode" of the family is the thing that is exempted. The extent or amount thereof "shall not exceed one block; but in no instance shall such homestead be reduced to less than twenty acres nor one lot." The homestead in question consists of one lot within the meaning of the statute: 13 R. C. L., p. 576, § 39. Homestead laws are remedial in their nature and according to the weight of authority should be liberally construed so as to effect the purpose of the statute: 21 Cyc. 461; 15 Am. & Eng. Ency. of Law (2 ed.), p. 533; 13 R. C. L., p. 547, § 8.

4, 5. It is next asserted by defendants' counsel that the plaintiffs could not claim the property exempt as a homestead after the court had entered an order for the sale of the attached property. We fail to see how this question is germane to the case. The property was attached October 23, 1913. On October 24th of the same year, D. M. Watson, the husband, served upon the levying officer a notice of claim of exemption as a homestead as the actual abode of himself and family. The notice was prompt and timely. The fact that as a matter of precaution the wife on behalf of the family later served a similar notice would not lessen the force of the first notice which was sufficient: Section 224, L. O. L; *Wilson* v. *Peterson,* 68 Or. 525 (136 Pac. 1187). There was no waiver of the right of homestead by the failure of D. M. Watson to appear in the action and

object to the order of sale. The taking of the order of sale would perhaps preserve whatever rights the attaching creditors might have had if there had been an abandonment of the homestead: *Hansen* v. *Jones,* 57 Or. 416 (109 Pac. 868); *Bowman* v. *Sherrill,* 59 Or. 603 (117 Pac. 1122).

6. Defendants' counsel make the further claim that under the statute, as construed by the lower court, a debtor living in one addition where lots are platted 25x100 feet, while his neighbor just across the line resides in an addition where the lots are platted 100x100 feet, would be upon an unequal footing and under the exemption law unreasonable and unconstitutional, as granting privileges or immunities to one citizen which, under the same terms, would not belong to all, in contravention of Article I, Section 20, of the Constitution of Oregon. The same inequality might be urged against a law exempting a team of two horses. Debtor A might own a team of horses of the value of $400 and his neighbor debtor B a pair of horses of the value of only $100. Such inequalities in the operation of laws are not unusual. The legislature in creating the homestead exemption, and in prescribing its limitations, must legislate for the whole state, and adopt a general rule to cover a multitude of variations and which in its general operations would secure a reasonable exemption. The primary object is to exempt from judicial sale the actual abode of a debtor's family, together with the land and the appurtenances connected with the home, sufficient for its convenient enjoyment. Quantity and value operate only incidentally as limitations upon the homestead exemption: 13 R. C. L., p. 580, § 44. It would be impossible to make the extent of the homestead the same in all instances. So long as the same is in accordance with the humane

policy of the law creating the homestead right, and not to an unreasonable extent in area, the law should be applied to all cases coming within the equity and spirit of the statute, although it may in some instances work out a slight inequality: 13 R. C. L., p. 543, § 4; *Heidel* v. *Benedict*, 61 Minn. 170 (63 N. W. 490, 52 Am. St. Rep. 592, 31 L. R. A. 422).

7. It is also contended by counsel for defendants that the property is not occupied as a homestead within the intent of the law. Mrs. Annie M. Watson, one of the plaintiffs, testifies in substance that she was married to her present husband in 1880; that they have lived upon the property in suit continuously since October 24, 1911, when her husband purchased it; and that he has been away temporarily working for a company at Tulsa, Oklahoma, to earn money with which to settle up. The evidence supports the complaint. The law will not deprive a family of a homestead merely because the husband and head of the family is absent on business or away temporarily for other reasons: 13 R. C. L., p. 648, § 109; *Griffin* v. *Sheley*, 55 Iowa, 513 (8 N. W. 343); *Pierson* v. *Truax*, 15 Colo. 223 (25 Pac. 183).

The decree of the trial court should be affirmed, and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BURNETT concur.

Argued January 24, reversed February 5, 1918.

MATLOCK *v.* MATLOCK.

(170 Pac. 528.)

(See, also, 86 Or. 78; 167 Pac. 311.)

Appeal and Error—Appealable Orders.

1. Where, after divorce suit had been commenced in one Circuit Court by the husband by filing complaint and issuing summons, the wife commenced suit in another Circuit Court, an order of the latter court overruling demurrer and an order allowing suit money and alimony if void for want of jurisdiction were final and appealable.

Courts—Jurisdiction—"Proceeding in Rem"—"Subject Matter."

2. Under Section 63, L. O. L., providing that a court shall be deemed to have acquired jurisdiction from the time of the service of the summons, Section 51 providing that actions at law shall be commenced by filing a complaint with the clerk of the court, Section 395 providing in effect that Section 51 applies to commencement of suits in equity, Section 526 providing that an action or suit is deemed to be pending from the commencement thereof until it is finally determined on appeal or until the expiration of the period allowed to take an appeal, and Section 396 providing that any suit for a dissolution of the marriage contract may be commenced and tried in any part of the state in which either party to the suit resides, where both suits were for divorce, involving the status of the parties, the Circuit Court of M. County could not, after the husband had commenced suit in the Circuit Court of another county by filing a complaint and issuing summons, acquire jurisdiction over the subject matter of the suit and of the person of the husband, although the summons was first served in the suit by the wife in M. County; the rule being that, when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues subject only to appellate authority until the matter is finally disposed of, a divorce proceeding in so far as it fixes the status of the parties being a "proceeding *in rem*," and "subject matter" in its broadest sense meaning object, the thing in dispute, but in a legal sense, when reference is made to matters of jurisdiction, meaning the nature of the case and the relief sought.

[As to pendency of suit for divorce as bar to like suit by other spouse in another jurisdiction or county, see note in Ann. Cas. 1914A, 1140.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit for a divorce instituted by Mrs. Mary F. W. V. Matlock against J. D. Matlock. The com-

plaint was filed in the Circuit Court for Multnomah County on June 27, 1916. Personal service was had on the defendant in Lane County June 28, 1916. Mr. Matlock, the defendant, appeared specially and moved to dismiss the suit on the ground that the court did not have jurisdiction of the cause; and supported his motion by affidavit. Upon the motion being overruled he filed an answer challenging the jurisdiction of the court to proceed with the cause, alleging in detail the same facts as set forth in the affidavit to the effect that prior to the institution of the present suit he had filed a suit for divorce against Mrs. Matlock in the Circuit Court for Lane County on May 8, 1916; that summons was issued and on the next day was placed in the hands of the sheriff of Multnomah County for service; that Mrs. Matlock could not be served in either Lane or Multnomah counties; that on June 27, 1916, he filed an affidavit for publication of summons; that on July 3d of the same year the Circuit Court for Lane County granted an order of publication on the ground that the defendant was concealing herself within the state for the purpose of avoiding service. As shown by affidavit Mrs. Matlock did not controvert the fact that Mr. Matlock had commenced his suit in Lane County on May 8th, but denied that she had concealed herself for the purpose of avoiding service. The answer pleaded that the Circuit Court for Lane County having jurisdiction of the premises adjudged that Mrs. Matlock had concealed herself for the purpose of avoiding service; that the facts stated in the affidavit for publication were true and that in all respects it was sufficient to justify an order for publication. Attached to the answer is a copy of the complaint filed in Lane County from which it appears that both complaints were for a divorce, involving the status of the parties,

and that the issues necessary to be determined in both cases were the same. Mrs. Matlock demurred to this answer on the ground that it appeared therefrom that the Multnomah County Court acquired jurisdiction before the completion of service in the Circuit Court for Lane County. This demurrer was sustained by the court and the defendant refused to answer further. On September 9, 1916, the court made an order directing the defendant to pay plaintiff the sum of $500 for plaintiff's use in prosecuting the suit and the sum of $100 per month for her maintenance pending the determination of the cause. Defendant appealed to this court from the order sustaining the demurrer and the order allowing suit money and temporary alimony.

REVERSED. SUIT DISMISSED.

For appellant there was a brief with oral arguments by *Mr. Martin L. Pipes, Mr. John M. Pipes* and *Mr. Lark Bilyeu.*

For respondent there was a brief over the names of *Mr. James N. Davis, Mr. Thomas Mannix* and *Mr. E. A. Burt,* with oral arguments by *Mr. Davis* and *Mr. Mannix.*

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant contends that the orders appealed from are deemed final and appealable because they are void for want of jurisdiction; that the Multnomah court had no jurisdiction to determine the status of the parties in a suit for divorce between them, because a suit for that purpose and involving that issue between the same parties was commenced prior thereto in a court of co-ordinate jurisdiction within the state, and that the Circuit Court for Multnomah County

could not take away from the Circuit Court for Lane County the power to proceed to final decree in the cause instituted in the latter court.

1. The order overruling the demurrer and the order allowing suit money and alimony, if void for want of jurisdiction of the court to make them, are final and appealable: *Deering & Co.* v. *Quivey,* 26 Or. 556, 558 (38 Pac. 710); *Therkelsen* v. *Therkelsen,* 35 Or. 75, 78 (54 Pac. 885, 57 Pac. 373); *Oregon R. & N. Co.* v. *Eastlack,* 54 Or. 196 (102 Pac. 1011, 20 Ann. Cas. 692); *Holton* v. *Holton,* 64 Or. 290 (129 Pac. 532, 48 L. R. A. (N. S.) 779). Counsel for plaintiff contend that it is the fact of service that gives the court jurisdiction. This claim is made by virtue of Section 63, L. O. L. A suit cannot be deemed pending until it has been technically commenced. In order to determine whether an action has been commenced we must resort to the rules to determine what constitutes the commencement of an action. These rules vary under the statutory provisions and judicial decisions in the different jurisdictions: 1 C. J., p. 59, § 77a. In this state an action is commenced for all purposes, except determining the running of the statute of limitations, by the filing of the complaint: Section 51, L. O. L.; 1 Cyc. 747; *Coggan* v. *Reeves,* 3 Or. 275; *Belknap* v. *Charlton,* 25 Or. 41, 48 (34 Pac. 758); *Burns* v. *White Swan Mining Co.,* 35 Or. 305, 311, 312 (57 Pac. 637); *Posson* v. *Guaranty Loan Assn.,* 44 Or. 106 (74 Pac. 923); *Dutro* v. *Ladd,* 50 Or. 120, 123 (91 Pac. 459); *Kelsay* v. *Taylor,* 56 Or. 13 (107 Pac. 609). The provision of Section 51, L. O. L., applies to the commencement of a suit in equity: Section 395, L. O. L. Section 526, L. O. L., provides in part that an action or suit is deemed to be pending from the commencement thereof until it is finally determined upon appeal or until the expiration of the

period allowed to take an appeal. Section 396, L. O. L., provides in substance that in any suit for a dissolution of the marriage contract the same may be commenced and tried in any court of this state in which either party to the suit resides.

The Lane County Circuit Court acquired jurisdiction of the subject matter of the suit by the filing of the complaint: *Belknap* v. *Charlton,* 25 Or. 41, 48 (34 Pac. 758). Subject matter in its broadest sense means the cause; the object; the thing in dispute. But in a legal sense the subject matter of a suit when reference is made to matters of jurisdiction means the nature of the cause of suit and the relief sought: 7 R. C. L., p. 1051, § 86.

A decree in a divorce case fixes the status of the parties and, with reference to their being married or single, they can have but one status. The status is the thing about which the adjudication is made. A divorce proceeding then, in so far as it fixes the status of the parties, is a proceeding *in rem.* It has been so held in this state. In *Houston* v. *Timmerman,* 17 Or. 499, at page 505 (21 Pac. 1037, 11 Am. St. Rep. 848, 4 L. R. A. 716), Mr. Justice LORD, speaking for this court, said:

"A proceeding in divorce is partly *in personam* and partly *in rem;* and in so far as it is to affect the marriage status, it is to change a thing independent of the parties, and is a proceeding, not against the parties *in personam,* but against their status *in rem.* (Am. & Eng. Ency. of Law, tit. 'Divorce,' 751.) The matter upon which the jurisdiction acts is the status; * * ."

2. The question for determination is whether the Multnomah Circuit Court had the power to assume jurisdiction of the cause at a time when the defendant, J. D. Matlock, had in good faith commenced a suit in the Lane Circuit Court involving the same subject

matter by filing a complaint and issuing a summons and placing the same in the hands of the sheriff of Multnomah County for service. In other words, Could the Circuit Court for Multnomah County divest the Circuit Court for Lane County of jurisdiction which it had obtained over the subject matter of the suit and of J. D. Matlock, the plaintiff in the first suit, and prevent that court from obtaining jurisdiction of the person of Mrs. Matlock, the defendant in that suit, so as to enable the court for Lane County to render a decree binding on the parties, although the summons was first served in a suit in Multnomah County? According to the weight of authority, and what seems to be the true rule, such power did not reside in the Multnomah County Circuit Court: *Wells* v. *Montcalm Circuit Judge,* 141 Mich. 58 (104 N. W. 318, 113 Am. St. Rep. 520); *Farmers' Loan & Trust Co.* v. *Lake St. Elevated R. R. Co.,* 177 U. S. 51 (44 L. Ed. 667, 20 Sup. Ct. Rep. 564); *In re Talbot* (Ohio), 9 Weekly Law Bulletin, 271; *Chicago K. & W. R. R. Co.* v. *Board of Commissioners,* 42 Kan. 223, 227 (21 Pac. 1071); *Dungan* v. *Superior Court,* 149 Cal. 98 (84 Pac. 767, 117 Am. St. Rep. 119); *Oh Chow* v. *Brockway,* 21 Or. 440 (28 Pac. 384); *Mound City Co.* v. *Castleman,* 187 Fed. 921, 925 (110 C. C. A. 55); *Heidritter* v. *Elizabeth Oil Cloth Co.,* 112 U. S. 294, 301 (28 L. Ed. 729, 5 Sup. Ct. Rep. 135); *Loveland-Garrett Co.* v. *Day,* 30 Ky. Law Rep. 879 (99 S. W. 924).

It is a familiar principle that when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues subject only to the appellate authority until the matter is finally and completely disposed of, and no court of co-ordinate authority is at liberty to interfere with its action. This principle is essential to the proper and orderly ad-

ministration of the law and in order to avoid conflict in the rendition of final decrees. While its observance might be required on the grounds of judicial comity and courtesy it does not rest upon such circumstances exclusively, but is usually enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process. An essential condition of the application of the rule as to priority of jurisdiction is that the first suit shall afford the defendant in the second an adequate and complete opportunity for the adjudication of his or her rights. The suit in Lane County afforded Mrs. Matlock ample opportunity to apply for and have her rights adjudicated: 7 R. C. L., p. 1067, § 105.

Two co-ordinate courts of a state cannot have jurisdiction to determine the status of the same parties in a divorce suit at the same time. The court whose jurisdiction first attached proceeds to a final determination of the case exclusive of any other court.

The Circuit Court for Multnomah County was without authority to make the order appealed from. It follows that the order and decree must be reversed and the suit dismissed; and it is so ordered.

REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued January 4, reversed and remanded February 5, 1918.

WARD v. JENSON.*

(170 Pac. 538.)

Fraud—Exchange of Land—Measure of Damages.

1. For false representations inducing an exchange of land the measure of damages is the difference between the market value of the property parted with by the person defrauded and the market value of the property received by him.

Fraud—Actionable Fraud—Statements.

2. As a general rule, a false representation does not constitute actionable fraud unless it relates to a fact which is existent or has existed.

Fraud—Opinion.

3. A mere expression of an opinion or a representation in regard to a matter of estimate or judgment does not ordinarily amount to fraud.

Fraud—Actionable Fraud.

4. While a representation of value, when standing alone, is usually regarded as a mere opinion, it may, under special circumstances, be treated as representation of fact.

Fraud—Exchange of Property—Evidence Admissible.

5. In an action for damages for fraud in exchange of land, defendant's statement as to value of his place, when taken in connection with the other evidence, *held* at least to present jury question whether the representation was one of fact.

Fraud—Exchange of Property—Matters Known by Plaintiff.

6. If plaintiff knew that defendant only had a contract to purchase 10 acre tract, and that he had not given a mortgage on it, and, notwithstanding such knowledge, exchanged properties, she cannot predicate fraud upon any statements made by defendant concerning a mortgage.

Fraud—Evidence—Statements by Defendant.

7. A witness testifying to a conversation between plaintiff and defendant was properly permitted to state that defendant told plaintiff that the place he was trading to her was worth $18,000, where it was plain that such statement related to the same conversation concerning which plaintiff had already testified.

Brokers—Knowledge of Agent—Notice to Principal.

8. That a broker assisting plaintiff in negotiating an exchange was also the agent of defendant could not of itself warrant the re-

*On measure of damages for fraudulent representations in the sale or exchange of real estate, see notes in 8 L. R. A. (N. S.) 804; 16 L. R. A. (N. S.) 818. REPORTER.

fusal of an instruction that notice to the broker was notice to plaintiff.

Fraud—Damages—Evidence Admissible.

9. In action for damages for fraudulently inducing an exchange of lands, evidence as to the value of plaintiff's land was improperly excluded where defendant's answer denied plaintiff's allegation of value of such land.

[As to actions to recover for false representations, see notes in 20 **Am. Dec.** 626; 18 **Am. St. Rep.** 555.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is an action for damages alleged to have been caused by fraudulent representations inducing the exchange of lands. The plaintiff Lottie E. Ward owned, subject to a $1,700 mortgage, real property in Portland, Oregon. The defendant, Thomas A. Jenson, was in the possession of 14.34 acres of land in Orange County, California, but he owned only 4.34 acres. He had a contract for the purchase of the remaining and adjoining 10 acres for the price of $9,000, of which only $1,000 had been paid. The complaint alleges that for the purpose of inducing her to exchange her Portland property for the Orange County property the defendant falsely and fraudulently represented to her that he had invested $10,000 in the California property; that it had cost him $6,000 to level the land so that it could be irrigated, to buy and set out orange trees and to install a water-pipe line; that the pumping plant on the premises was of sufficient capacity to supply water for irrigating all the property; that from three to six hours was sufficient time for the irrigation of all the tract; that he owned the 10-acre tract; that the whole property was of the value of $18,000; that he had a mortgage to secure the loan of $8,000 on the 10-acre tract and that plaintiff could judge of the value of that tract

by the fact that there was a mortgage on it to secure a loan of $8,000; and that the Orange County property contained 15 acres. The pleading points out the particulars wherein it is claimed that the alleged representations were false. It is alleged that the defendant only had $3,291 invested in the premises; that the total expenditure made by the defendant for trees and a pipe-line and for leveling the 4.34 acre tract was $141, while the 10-acre tract had already been leveled and planted to trees when the defendant contracted to purchase it; that the pumping plant was not of sufficient capacity to supply water for irrigation; that it required from ten to eleven hours at a cost of $1 an hour to irrigate the property; that the two tracts were not worth to exceed $12,000 "including encumbrances"; that the defendant did not own the 10-acre tract, "and there was no mortgage to secure a loan of $8,000 on said 10-acre tract, and said $8,000 mortgage did not indicate the value of said tract," but that defendant had purchased the 10-acre tract on a contract for $9,000 and had paid $1,000, leaving a balance of $8,000 due on the contract; and that the two tracts contained only 14.34 acres of land.

The plaintiff alleges that she believed the representations of the defendant to be true and that, relying on them, she exchanged her Portland property for the California property, to her damage. A trial by jury resulted in a verdict for the plaintiff and the defendant appealed from the consequent judgment.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Hamilton R. Johnstone, Mr. George R. Alexander* and *Messrs. Benson & Benson,* with an oral argument by *Mr. Johnstone.*

For respondent there was a brief over the names of *Mr. Otto J. Kraemer* and *Messrs. Chamberlain, Thomas & Humphreys,* with an oral argument by *Mr. Kraemer.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The court instructed the jury that:

"The measure of damages in this case is the difference between the value of the land as it would have been if it was as represented, and the actual market value; in other words: the value which Mr. Jenson represented was the true value and its actual value, which you find is the market value."

This instruction was erroneous. It is settled in this state that in an action to recover damages for false representations inducing an exchange of property the measure of damages is the difference between the market value of the property parted with by the person defrauded and the market value of the property received by him: *Salisbury* v. *Goddard,* 79 Or. 593, 600 (156 Pac. 261); *Purdy* v. *Underwood, ante,* p. 56 (169 Pac. 536). See, also: *Van de Wiele* v. *Garbade,* 60 Or. 585, 591 (120 Pac. 752); *Caples* v. *Morgan,* 81 Or. 692, 706 (160 Pac. 1154); *Smith* v. *Bolles,* 132 U. S. 125 (33 L. Ed. 279, 10 Sup. Ct. Rep. 39); *Sigafus* v. *Porter,* 179 U. S. 116 (45 L. Ed. 113, 21 Sup. Ct. Rep. 34); *George* v. *Hesse,* 100 Tex. 44 (93 S. W. 107, 123 Am. St. Rep. 772, 15 Ann. Cas. 456, 8 L. R. A. (N. S.) 804); *Robertson* v. *Frey,* 72 Or. 599 (144 Pac. 128); *Barbour* v. *Flick,* 126 Cal. 628 (59 Pac. 122); 12 R. C. L. 455.

When testifying as a witness the plaintiff was asked: "Was anything said about the value of the property there?" and over the objection of the defendant she was permitted to answer: "He said his place was worth eighteen thousand dollars, and he had ten thou-

sand dollars invested in it and there was a mortgage of eight thousand dollars against it." It is contended that this answer was prejudicial error because the statement attributed to the defendant was only an expression of his opinion of the value of the property and hence did not amount to fraud. The force and effect of the answer of the witness may be better understood if a brief statement is made of some of the testimony given by her both before and after the answer in question. She explained to the jury that she valued her property in Portland at $10,000 and that after deducting $1,700, the amount of a mortgage, its net value to her was $8,300; she testified that the defendant told her that he valued his property at $18,000 and that after deducting the $8,000 mortgage on his property "there would be a cash difference coming to him"; that she told him that she had no money to pay a cash difference and that thereupon he stated that he would trade even if she would pay his agent's commission but that he was giving her "two thousand dollars the best of the deal and this was on account of his wife's poor health that he had to make the change." The plaintiff also testified that the defendant told her "that he bought the ten acres for nine thousand dollars, but his reason for buying that was because it had the buildings and pumping plant on, and it had cost him six thousand dollars to level off the land so the water would flow for irrigation and to buy the trees at sixty-five cents a tree and set them out, and that he had ten thousand dollars invested in the property; and, I thought that if he had paid nine thousand dollars for ten acres that it was worth his price; if it had cost him six thousand dollars to level it off and buy the trees and set them out."

The witness was also asked the following question: "Was there anything said about any connection be-

tween the value of the property and the mortgage?" and she answered: "Yes. He said you can judge as to the value of the property by the mortgage there is on it." There were between eleven and twelve hundred trees on the two tracts and according to the testimony of the plaintiff: "Mr. Jenson told me that this was preferred stock and that they were selling it at seventy-five cents a tree, but he bought them at sixty-five cents." The plaintiff further explained that she understood that the defendant had expended the $6,000 "for buying trees, and labor in setting them out and leveling off the land, and the pipe line."

2–5. As a general rule, a false representation does not constitute actionable fraud unless it relates to a fact which is existent or has existed in the past; and therefore the mere expression of an opinion or a representation in regard to a matter of estimate or judgment does not ordinarily amount to fraud: 12 R. C. L., p. 244, § 14. A representation of value, when standing alone, is usually regarded as a mere opinion because it largely involves a matter of judgment and estimation about which persons may differ; and yet it may under special circumstances be treated as a representation of a fact: 2 Pom. Eq. Jur., § 878. However, in the instant case the representation that the property was worth $18,000 does not stand alone and by itself but it is coupled with other statements made in support of the representation of value. In 20 Cyc. 18, the rule is stated thus:

"An expression of opinion may be so blended with statements of fact as to become itself a statement of fact. Where one of the parties has superior knowledge on the subject his expression of an opinion which he knows he does not entertain because it is contrary to the facts may be actionable if made for the purpose of inducing another to act upon it, which he does to his injury."

The language just quoted is approved and relied upon in *Olston* v. *Oregon Water Power & Ry. Co.*, 52 Or. 343, 355 (96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915), where this court held that:

"Although the matter alleged and offered in proof as constituting the fraud is largely a matter of opinion, yet sometimes a statement of an opinion is necessarily based upon a fact or carries with it such an inference of fact that it can be interpreted as a statement of fact, and where it is known to be false and made with intent to deceive, it may be actionable."

The doctrine expressed in 20 Cyc. 18, and approved in *Olston* v. *Oregon Water Power & Ry. Co., supra,* has been repeatedly and consistently announced and affirmed by this court: *Scott* v. *Walton,* 32 Or. 460, 462 (52 Pac. 180); *Boelk* v. *Nolan,* 56 Or. 229, 237 (107 Pac. 689); *Elgin* v. *Snyder,* 60 Or. 297, 304 (118 Pac. 280); *Van de Wiele* v. *Garbade,* 60 Or. 585, 593 (120 Pac. 752); *Turk* v. *Botsford,* 70 Or. 198, 201 (139 Pac. 925); *Koehler* v. *Dennison,* 72 Or. 362, 373 (143 Pac. 649); *Smith* v. *Anderson,* 74 Or. 90, 95 (144 Pac. 1158); *Allen* v. *McNeelan,* 79 Or. 606, 611 (156 Pac. 274); *Jeffreys* v. *Weekly,* 81 Or. 140, 148 (158 Pac. 522). Even though it be assumed, without deciding, that the court could not say as a matter of law that the statement ascribed to the defendant was the representation of a fact, it must be conceded that the court could not say as a matter of law that the statement amounted to nothing more than the expression of an opinion; and, hence, it became at least a question for the jury to decide whether the statement was a mere expression of opinion or the representation of a fact: *Olston* v. *Oregon Water Power & Ry. Co.,* 52 Or. 343, 356 (96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915); *Smith* v. *Anderson,* 74 Or. 90, 95 (144 Pac. 1158); 12 R. C. L., pp. 247, 248, 282, 446; 20 Cyc. 17. In other words,

the statement attributed to the defendant was either as a matter of law a representation of a fact or it presented a question for the jury to decide whether it was only an expression of opinion or the representation of a fact; and in either event it was proper to receive the answer in evidence.

6. The necessity of a retrial makes it proper to notice the contention of the defendant that the plaintiff knew that there was no mortgage on the ten acre tract. The agreement for the exchange of properties was reduced to writing. The defendant signed the writing on November 10, 1914, and the plaintiff signed on the following day. The record does not show the exact day when the agreement was carried out but it appears that the exchange was completed at some time in January, 1915. The defendant claims that the plaintiff knew that he only had a contract for the purchase of the ten acre tract and that there was no mortgage on the land. If the plaintiff knew that Jenson only had a contract to purchase the ten acre tract and that he had not given a mortgage on it, and, notwithstanding such knowledge, exchanged properties, then she cannot predicate fraud upon any statements made by the defendant concerning a mortgage and the court should not permit the jury to consider any evidence of statements about a mortgage.

7. Another witness, Paul Melby, testified that "Mr. Jenson told Mrs. Ward that the place he was trading to her was worth $18,000." Standing alone the answer of this witness might be objectionable, but the record shows that the witness was testifying concerning a conversation he heard between plaintiff and the defendant and it is evident that the answer of the witness related to the same conversation concerning which the plaintiff

had already testified. The testimony of this witness was competent.

8. A real estate broker assisted the plaintiff in negotiating the exchange of properties. The defendant requested the court to instruct the jury that notice to the broker was notice to the plaintiff. The court refused to give the requested instruction. The plaintiff claims that the court was warranted in refusing the instruction upon the theory that the broker was also the agent of the defendant. If there was an entire lack of evidence to show that the broker had knowledge of the things complained of it was proper to refuse the requested instruction; but the fact that a double agency existed, if it did exist, would not of itself under all circumstances warrant a refusal to instruct the jury that notice to the broker is notice to one of the principals. The rule is stated in 2 C. J., 872, thus:

"Notice to an agent, who, with their knowledge and consent, represents both parties to a transaction, is notice to either of them to whom it would be notice if the agent represented him alone, and if each would be charged the notice to the agent is notice to both. Thus where a principal knows that his agent is also acting as agent for the party adversely interested in the transaction, and yet consents to let him act as his agent, the principal is estopped from denying notice and knowledge which the agent has during the negotiations. If, however, either party does not know that the agent is acting for the other, the agent's knowledge will not affect the one who is ignorant thereof."

See, also: 9 C. J., p. 673, § 150; 2 Mechem on Agency (2 ed.), §§ 1837–1839.

9. The court refused to permit the defendant to offer evidence of the value of the Oregon property. The complaint alleges that the parties agreed that the value of the Oregon property, exclusive of the mortgage, was $8,300; but the answer specifically denies this allega-

tion. Since the measure of damages is the difference between the market value of the property parted with and the market value of the property received it was necessary to ascertain the value of the Portland property. The parties had the right, if they wished, to agree upon the market value of the property. The plaintiff says they did agree while the defendant says they did not agree. The defendant had a right not only to offer evidence for the purpose of showing that they did not agree but he also had a right to offer evidence in support of his contention that no damage resulted to the plaintiff and to do this he must of necessity be permitted to offer evidence of the value of the Portland property. If the parties did not agree upon the value of the Portland property the jury would be obliged to ascertain its market value: *Rockefeller* v. *Merritt,* 76 Fed. 909 (22 C. C. A. 608, 35 L. R. A. 663).

For the reasons already stated the judgment is reversed and the cause is remanded for a new trial, with directions to the trial court to permit the plaintiff to amend her complaint if she desires.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Motion to dismiss appeal denied November 21, 1916.
Argued on the merits January 17, affirmed January 29, rehearing denied February 13, 1918.

MERIDIANAL COMPANY *v.* BOURNE.

(160 Pac. 1151; 170 Pac. 521.)

Appeal and Error—Proceedings to Transfer Cause—Notice of Appeal—Identification of Judgment.

1. A notice of appeal describing the judgment appealed from by reference to the title and date of entry, if insufficient to identify the judgment, may be read in connection with the undertaking on appeal, including in its description of the judgment the statement of the amount for which it is entered, and, when so read, sufficiently identifies the decision to confer jurisdiction on the Supreme Court by the filing of the transcript.

ON THE MERITS.

Appeal and Error—Scope of Review—Absence of Bill of Exceptions.

2. Absence of bill of exceptions precludes consideration of the testimony and of rulings on the admission or rejection of evidence, and the court can consider only whether the complaint shows a cause of action and the findings justify the judgment.

Appeal and Error—Scope of Review—Absence of Bill of Exceptions.

3. In the absence of bill of exceptions, the court cannot consider depositions accompanying the transcript.

From Columbia: JAMES A. EAKIN, Judge.

Action by the Meridianal Company against J. Kenyon Bourne, to recover the amount due upon a promissory note. From a judgment in favor of plaintiff, defendant appealed. Respondent files motion to dismiss appeal. Motion denied.

Mr. Robert C. Wright, for the motion.

Mr. Clyde Richardson, contra.

Opinion by MR. CHIEF JUSTICE MOORE.

1. This is a motion to dismiss an appeal on the ground that the written notice thereof does not sufficiently identify the judgment attempted to be reviewed. Omitting the immaterial parts of the notice, it reads:

"You and each of you are hereby notified that the defendant J. Kenyon Bourne, in the above-entitled action, hereby appeals to the Supreme Court of the State of Oregon, from all that certain judgment rendered and entered in the above-entitled court and cause on the seventeenth day of June, 1916, which said judgment was in favor of the plaintiff and against the defendant."

If it be assumed that this notice is inadequate under the rule announced in this court (*Crawford* v. *Wist,* 26 Or. 596 (39 Pac. 218); *Hamilton* v. *Butler,* 33 Or. 370 (54 Pac. 200); *Duffy* v. *McMahon,* 30 Or. 306 (47 Pac. 787), the undertaking on appeal may be read in connection with the notice for the purpose of identifying the judgment or decree complained of (*Salem Traction Co.* v. *Anson,* 41 Or. 562 (67 Pac. 1015, 69 Pac. 675); *Keady* v. *United Rys. Co.,* 57 Or. 325 (100 Pac. 658, 108 Pac. 197); *MacMahon* v. *Hull,* 63 Or. 133 (119 Pac. 348, 124 Pac. 474, 126 Pac. 3); *Holton* v. *Holton,* 64 Or. 290 (129 Pac. 532, 48 L. R. A. (N. S.) 779).

The material part of the undertaking on appeal herein reads:

"Whereas, the defendant in the above-entitled action appeals to the Supreme Court of the State of Oregon from a judgment made and entered against defendant in said action in the said Circuit Court, in favor of the plaintiff in the said action and against the defendant on the seventeenth day of June, A. D. 1916, for $1,000, and $120 attorney's fees, and disbursements of $26.65."

This description of the judgment sufficiently identifies the decision to be reviewed, and, when read in connection with the notice of appeal, shows that jurisdiction of the cause was conferred upon this court by the filing of the transcript.

The motion is denied. MOTION DENIED.

Affirmed January 29, 1918.

ON THE MERITS.

(170 Pac. 521.)

Department 1. Statement by MR. CHIEF JUSTICE MCBRIDE.

This was an action upon a promissory note. The answer admitted the execution of the note but alleged failure of consideration and fraud, and also pleaded certain counterclaims. The case was tried without a jury and there were findings and a judgment in favor of plaintiff, from which defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Clyde Richardson.*

For respondent there was a brief and an oral argument by *Mr. Robert G. Wright.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

2. There is no bill of exceptions and we are therefore precluded from considering the testimony and rulings of the court relating to the admission or rejection of evidence. The only questions which we can consider are whether the complaint states facts sufficient to constitute a cause of action, and whether the findings are sufficient to justify the judgment rendered: *Jeffery* v. *Smith,* 63 Or. 514 (128 Pac. 822); *Miller* v. *Head Camp,* 45 Or. 192 (77 Pac. 83); *Frazier* v. *Cottrell,* 82 Or. 614 (162 Pac. 834).

The complaint is in the usual form and its substantial allegations are admitted in the answer, that is to say: defendant admits the execution of the note for

value, the transfer of it to plaintiff after maturity, but denies that it has not been paid, making however no affirmative plea of payment. The attempted defenses are, that on June 15, 1913, defendant made J. E. B. Bourne, plaintiff's assignor, his agent to secure the satisfaction of a mortgage held by parties in England against property owned by defendant in the State of Oregon, and also for the purpose of pledging by mortgage certain property in England held jointly by said J. E. B. Bourne and defendant; that by virtue of such agency J. E. B. Bourne procured from Alfred W. Dando a joint loan of $5,000 for the use and benefit of himself and defendant; that in October, 1913, by reason of false representations by J. E. B. Bourne to defendant that he had borrowed no money on defendant's account on said joint property, defendant was induced to make and deliver the note mentioned to J. E. B. Bourne for the payment of a mortgage satisfaction on property owned by defendant, and that at the time of the execution and delivery of said note J. E. B. Bourne had in his possession $2,500 of money belonging to defendant, and there was no consideration therefor. That prior to the assignment of the note J. E. B. Bourne caused to be charged up against defendant the sum of $34.50 on account of fees to A. Morton, a solicitor, on account of said mortgage loan and said sum has been paid Morton by defendant.

3. There was also a setoff in the amount of $251.90 pleaded on account of a half interest in certain moneys secured by J. E. B. Bourne for the joint use of himself and defendant. It appears from the findings that there were offered the depositions and testimony of certain witnesses to support defendant's contentions, but that plaintiff objected to the admission thereof because neither of the alleged separate defenses stated facts

sufficient to constitute a defense to the action, and plaintiff specifically objected to each interrogatory and answer of the witnesses upon the ground in each instance that such questions and answers were immaterial and irrelevant and that the scope of each interrogatory and its answer was not within any issue made by the pleadings and neither the interrogatory nor its answer in all cases was directed to or in support of any issue in the pleadings. The court allowed each of said objections specifically, and also an exception to its ruling. Waiving the question as to the sufficiency of the separate defenses we do not have before us in any manner authorized by law the depositions and testimony excluded by the ruling of the court. Conceding for the purposes of this discussion the sufficiency of the defenses, we have no means of ascertaining whether the evidence offered tended in any way to support the allegations of the answer. We have held over and over again that the only method by which testimony offered and rejected can be brought into this court is by incorporating it in a bill of exceptions: *Lewis* v. *Clark,* 66 Or. 461 (134 Pac. 1194).

It is true that certain depositions accompany the transcript but in the absence of a bill of exceptions we have no more authority to consider these than we would have to call the circuit judge before us and inquire of him concerning the testimony offered at the trial. The findings are sufficient to uphold the judgment which is therefore affirmed. AFFIRMED. REHEARING DENIED.

MR. JUSTICE BURNETT, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued October 4, affirmed December 27, 1917, rehearing denied February 13, 1918.

MURPHY *v.* BJELIK.

(169 Pac. 520; 170 Pac. 723.)

Quieting Title—Title of Plaintiff—Necessity of Title.

1. In a suit by one claiming under a sheriff's deed to remove clouds from his title, where defendants pleaded the judgment under which the sale was made and did not allege that it was a nullity or that the sheriff's sale was void, but, on the contrary, relied thereon claiming that the transaction whereby plaintiff acquired title was a redemption from that judgment, but plaintiff, instead of relying on the pleadings, offered the entire record from the commencement of the action to the execution and delivery of the sheriff's deed, he was not entitled to a decree establishing his title if the sheriff's deed was thereby shown to be void, since, having chosen to offer evidence of his alleged title, he must rely upon the strength of his own title.

Equity—Pleadings—Admissions—Conclusiveness Against Coparty.

2. An admission in the answer of one defendant is not conclusive upon other defendants.

Quieting Title—Evidence—Burden of Proof.

3. Where, in a suit to remove clouds, plaintiff claims to own the land and each of the defendants claim to have a lien thereon, each party has the burden of proving his claim.

Garnishment—Right to Judgment on Garnishee's Answer.

4. Under Section 295 et seq., L. O. L., relating to attachment and garnishment and providing that the garnishee shall furnish a certificate of property belonging to the defendant or the amount of any debt owing to the defendant, that if he refuses to give a certificate, or gives one unsatisfactory to plaintiff, he may be required to appear for examination, that the issues between the plaintiff and the garnishee shall be tried as ordinary issues of fact, that if the garnishee fails to answer the court or judge may compel him to do so or plaintiff may have judgment for want of such answer, and that, if it appears from the answer or is found upon the trial that the garnishee had property of defendants beyond that admitted in the certificate or in any amount if a certificate was refused, judgment may be given against the garnishee for the value thereof in money, a judgment against the garnishee is only authorized when he refuses to answer or when his answer is unsatisfactory to plaintiff, and, where he answers by admitting an indebtedness and plaintiff is satisfied with such answer, a money judgment against the garnishee is a nullity and gives plaintiff no right which he would not have without such judgment.

Garnishment — Execution — Enforcement — Judgment Against Garnishee.

5. Under Section 308, L. O. L., providing that if judgment is recovered by plaintiff, and it shall appear that property has been

attached, the court shall order it sold to satisfy plaintiff's demands, and that if execution issue thereon the sheriff shall apply the attached property or the proceeds thereof upon the execution, and Sections 233 and 234, relating to the manner of executing a writ of execution and providing that, in the case of property in the possession of or owing from any garnishee, if it appear from the garnishee's certificate that he is owing a debt then due, and if such debt is not paid by the garnishee to the sheriff on demand, he shall levy on the property of the garnishee as if the execution was against the garnishee's property, but that if such debt be not then due the sheriff shall sell the same as other property, the sale of a debt which has matured and is due is not contemplated, and an order directing the sheriff to sell a debt due from the garnishee would be a nullity.

Attachment—Necessity of Compliance With Statute.

6. Attachment proceedings are statutory, and the substantial requirements of the statute must be complied with.

Garnishment—Nature of Right Acquired by Plaintiff.

7. Garnishment does not create a lien in favor of plaintiff upon any money in the hands of the garnishee, nor upon any property owned by it, but gives rise to a contingent personal liability to respond to any judgment that may afterward be recovered by plaintiff against the garnishee's creditors.

Garnishment—Nature of Right Acquired by Plaintiff.

8. When plaintiff, in an action in which a garnishee files an answer satisfactory to plaintiff, secures a judgment, it does not create a lien upon any property of the garnishee, as the only judgment to which he is entitled is a judgment against the defendants in the action.

[As to garnishment as satisfaction of the principal debt, see note in 77 **Am. St. Rep.** 542.]

Garnishment — Execution — Enforcement — Judgment Against Garnishee.

9. Under Section 234, L. O. L., providing that, if it appear from the certificate of a garnishee that he is owing a debt to the judgment debtor then due if such debt is not paid to the sheriff on demand he shall levy on the garnishee's property, a demand on the garnishee for payment is jurisdictional and mandatory, and not merely directory, and a sale without such demand is void, as a levy upon and a sale of property of a garnishee under such circumstances is a pure proceeding *in invitum*, and the requirements of the statute ought to be strictly followed.

PETITION FOR REHEARING.

Garnishment—Execution—Levy on Property of Garnishee.

10. Under Section 234, L. O. L., as to execution against property in possession of a garnishee, if it appears from the certificate of the garnished third person that he is owing a matured debt to the judgment debtor in the action, the sheriff who is armed with writ of execution against the property of the judgment debtor, if such debt is not paid on demand, must levy on the property of the garnished third person as if the execution was against his property.

Garnishment—Jurisdiction Authorizing Entry of Judgment Against Garnishee.

11. Though by Section 301, L. O. L., a garnished third person, from the time of service of a copy of the writ and notice, is liable to plaintiff until the attachment be discharged or judgment satisfied, such service of writ and notice does not confer jurisdiction over the person of a garnishee so as to authorize entry of judgment against such garnishee, as the order prescribed in Section 303 must be obtained and served before the court acquires jurisdiction to render judgment against a garnishee who either refuses to give a certificate that he owes a matured debt or gives an unsatisfactory certificate.

Garnishment—Judgment Against Garnishee.

12. Section 983, L. O. L., as to the means to be used by the court to execute its powers, does not authorize judgment against a garnishee which has given a certificate of indebtedness, as it applies only where jurisdiction is conferred otherwise on a court or judicial officer, and cannot itself be the source of jurisdiction.

Garnishment—Levy of Execution on Garnishee's Property—Demand.

13. If there is no authority for judgment against a garnished person who has given a certificate of indebtedness, the demand on him prescribed by Section 234, L. O. L., is an indispensable prerequisite to satisfaction of an execution against the judgment debtor's property from that of the garnishee.

Courts—Circuit Courts—Presumption of Jurisdiction.

14. The Circuit Court being a Superior Court of record, when it produces a judgment relating to a matter within the general scope of its powers, such judgment generally proves itself, and, in the absence of affirmative evidence to the contrary, jurisdiction will usually be presumed.

Courts—Circuit Court—Jurisdiction.

15. If in rendering judgment the Circuit Court was not proceeding according to common law, as where exercising special powers not brought into action according to common law, jurisdiction will not be presumed from the fact of judgment, but must be made affirmatively to appear on the face of the record.

Garnishment—Judgment Against Garnishee.

16. Where there was no statutory authority for judgment against a garnishee which had given a certificate of indebtedness, the Circuit Court's attempted judgment was a nullity, and in contemplation of law it was no judgment at all.

Garnishment—Levy and Sale of Garnishee's Property—Void Character.

17. Where authority to seize the property of a garnishee company under execution against the property of the judgment debtor company could have been brought into existence only by first making demand upon the garnishee company to pay its debt to the judgment debtor company, and where the record does not affirmatively show that such authority was brought into existence, levy and sale of the garnishee company's property were void.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

Although this proceeding has sometimes been referred to by the litigants as a suit to quiet title, in reality it is more in the nature of a suit to remove cloud from title. The Monarch Lumber Company, an Oregon corporation, owned two tracts of land in Multnomah County, Oregon, one of which will be referred to as Tract A and the other will be designated as Tract B. Two sawmills and an electric power plant are located upon Tract A; and in 1911 this property was probably worth $500,000. Tract B consists of a block of ground which is used as a retail lumber-yard.

The plaintiff Grayson M. P. Murphy claims to own both tracts of land and traces his claim of title to a sheriff's deed executed and delivered to him on the faith of a sale which was made to satisfy an execution issued on a judgment obtained by E. W. Spencer on June 5, 1913. All the answering defendants are judgment creditors of the Monarch Lumber Company of Oregon, and all of their judgments were recovered subsequent to June 5, 1913, the date of the Spencer judgment. The plaintiff is proceeding on the theory that the sheriff's deed extinguished the liens of all judgments subsequent in time to the judgment recovered by Spencer and that consequently the judgments held by the defendants are clouds upon the title of the plaintiff. The answering defendants now take the position that the sheriff's deed was void.

We can gain a better understanding of the litigation if we first narrate some of the prominent transactions which must be kept in mind and then state the substance of the pleadings filed by the several parties. The Monarch Lumber Company of Oregon, un-

der date of September 1, 1911, executed 12 promissory notes for the aggregate sum of $300,000, each note being for $25,000 and payable one year after date to the order of the maker. The Monarch Lumber Company of Oregon secured these notes by conveying Tracts A and B by a trust deed to William W. Crawford as trustee. The Assets Realization Company, a corporation organized under the laws of New Jersey, acquired the notes and owned them when Spencer and the defendants recovered their several judgments. On July 30, 1913, the Monarch Lumber Company of Oregon, deeded Tract A and on August 4, 1913, it conveyed Tract B to a corporation which had been organized under the laws of Maine and was likewise called the Monarch Lumber Company, and hence on account of the two corporations bearing the same name one will be referred to as the Monarch Lumber Company of Oregon and the other as the Monarch Lumber Company of Maine. On September 4, 1913, the Monarch Lumber Company of Maine deeded both tracts of land to Ira M. Cobe, who at that time was occupying the position of vice-president of the Assets Realization Company. Subsequently about October, 1914, Cobe resigned as vice-president of the Assets Realization Company and on January 22, 1915, he deeded Tracts A and B to the plaintiff Grayson M. P. Murphy, who had succeeded Cobe as vice-president of the Assets Realization Company.

On March 20, 1913, E. W. Spencer commenced an action in the Circuit Court for Multnomah County to recover $16,750, interest, and attorney's fees from the Monarch Transportation Company, a corporation, the David Investment Company, a corporation, and Lester W. David on a promissory note signed by them. A writ of attachment was issued to the sheriff and that

officer executed the writ by delivering a copy together with a notice of garnishment to the Monarch Lumber Company of Oregon. The Lumber Company answered the writ and notice by delivering a certificate to the sheriff stating that "there is now due from the Monarch Lumber Company to the Monarch Transportation Company at least $7,250." After a trial Spencer obtained a judgment on June 5, 1913, against the Monarch Transportation Company, the David Investment Company and Lester W. David for $17,251.50, $750 attorney's fees and $783.80 costs and disbursements; and after reciting that certain property owned by the Monarch Transportation Company had been attached and directing that such attached property be sold, the judgment order states that, in addition to attaching the property owned by the Monarch Transportation Company the sheriff also

"attached the Monarch Lumber Company, a corporation duly organized and existing under the laws of the State of Oregon with its principal office and place of business in the county of Multnomah, State of Oregon, by leaving with the Monarch Lumber Company a certified copy of the writ of attachment and notice specifying the property attached, especially attaching any moneys, debts or other property in the possession of said Monarch Lumber Company owing to or belonging to said defendants or either of them and especially a sum of money due from said Monarch Lumber Company to the defendant, Monarch Transportation Company, and that subsequently thereto, to wit, May 31, 1913, the said Monarch Lumber Company made a return to the sheriff of Multnomah County, Oregon, stating that there was due and owing from the said Monarch Lumber Company to the Monarch Transportation Company, defendant, the sum of $7,250.

"It is therefore considered, ordered and adjudged by the court that the plaintiff herein have and recover

against said garnishee, Monarch Lumber Company, a corporation, the sum of $7,250 and that execution issue therefor, that the proceeds of said execution and the proceeds of any execution issued herein be applied first to the payment of the costs, disbursements and attorney's fees herein, subsequently to the payment of the demands of the plaintiff herein, to wit, the sum of $17,251.50 with accruing interest and if there be any property or proceeds remaining after satisfying said execution, the sheriff shall upon demand deliver the same to the defendants, Monarch Transportation Company."

An execution was issued on the judgment on January 26, 1914, and on that day the sheriff executed the writ by levying on Tracts A and B, without first demanding that the Monarch Lumber Company of Oregon pay the amount which, in answer to the notice of garnishment, it had stated was due the Monarch Transportation Company. The execution recites that Spencer obtained a judgment against the defendants in the action and that he "also recovered judgment against the Monarch Lumber Company" for $7,250, and the sheriff is then directed to levy upon and sell property of the defendants in the action and further that he satisfy the sum of $7,250 out of property owned by the Monarch Lumber Company. Pursuant to notice of sale the sheriff sold Tracts A and B on March 2, 1914, to E. W. Spencer for $7,633.60, and delivered to him a certificate of sale. Subsequently on March 11, 1914, the sale was confirmed.

Under date of January 14, 1915, E. W. Spencer, William W. Crawford as trustee, the Assets Realization Company, Ira M. Cobe and John Getz entered into an escrow agreement by the terms of which an assignment of the Crawford trust deed, the notes held by the Assets Realization Company, a deed from Cobe

to Spencer, and an assignment to John Getz of the sheriff's certificate of sale held by Spencer should be placed in escrow in a designated bank, and if Spencer paid $300,000 to the bank on January 29, 1915, the papers held by the bank should be delivered to Spencer, but if he failed to exercise his "option of purchase" then Getz had the option of paying $4,300 to the bank for Spencer as part of the purchase price for the assignment of the certificate of sale and an additional $4,300 on March 12, 1915, as the final payment for the certificate of sale. Spencer did not exercise his option to purchase; but his certificate of sale was acquired by John Getz who in turn assigned the certificate to the plaintiff. The assignment from Spencer to Getz is dated January 14, 1915, and the assignment transferring the certificate of sale from Getz to Grayson M. P. Murphy bears date January 18, 1915. Spencer was paid the total sum of $8,600 for his certificate of sale. On March 26, 1915, no redemption having been made, the sheriff executed a deed to Grayson M. P. Murphy who at that time held the certificate of sale which had originally been issued to Spencer.

All of the answering defendants secured and still hold unpaid judgments against the Monarch Lumber Company of Oregon. John Bjelik recovered a judgment on June 30, 1913, for $3,084. Brayton & Lawbaugh, Ltd., a corporation, commenced an action to recover money, attached Tract A on August 13, 1913, and secured a judgment on December 8, 1913, for approximately $8,000. A judgment for $803.95 was awarded to Patton on September 5, 1913, and A. C. Springer recovered a judgment for $6,000 on June 9, 1914.

The complaint filed by Murphy alleges that he owns and is in possession of Tract A; that he owns Tract B

and that this tract is not in the possession of any person except the sheriff who only has such possession as is necessary to sell certain lumber which the officer found on the premises and levied upon under an execution issued on a judgment. After averring that the defendants John Bjelik, the Brayton & Lawbaugh, Ltd., a corporation, and A. C. Springer each claims some interest in Tracts A and B the plaintiff alleges that their claims arise out of the respective judgments which they had against the Monarch Lumber Company of Oregon. The complaint also states that W. T. Patton claims some interest in the real property and the plaintiff proceeds to explain that Patton bases his claim upon his judgment against the Monarch Lumber Company of Oregon, the issuance of an execution on that judgment, a sale of Tracts A and B on execution, confirmation of the sale and the execution and delivery of a sheriff's deed to Patton. After alleging that the defendants each claimed some interest in the lands and explaining that their respective claims arose out of their judgments against the Monarch Lumber Company of Oregon the plaintiff alleges that

"each of said judgments was rendered subsequent to a judgment recovered by the consideration of this court by one E. W. Spencer as plaintiff against the Monarch Lumber Company (of Oregon) and that an execution was issued to enforce said judgment and all of said real property was sold under said execution, and the sale thereof was afterward confirmed by this court and a deed of conveyance of said real property"

was delivered by the sheriff and that the interest of each of the defendants was extinguished.

The defendants John Bjelik, Brayton & Lawbaugh, Ltd., and W. T. Patton filed separate answers and

cross-complaints; and since these three pleadings are substantially alike a statement of the contents of the Bjelik answer and cross-complaint will likewise be applicable to the other two. The averments of ownership and possession found in the complaint are denied, and then follows an allegation to the effect that Bjelik recovered a judgment against the Monarch Lumber Company of Oregon on June 30, 1913, for $3,084 which was docketed and became a lien upon the real estate owned by the Monarch Lumber Company of Oregon. Continuing, the defendant alleges that when he secured his judgment the Monarch Lumber Company of Oregon was indebted to the Assets Realization Company in the apparent sum of $300,000 which it was unable to pay; that afterwards the Monarch Lumber Company and the Assets Realization Company agreed that the former would convey Tracts A and B to the latter in full payment of the debt; that the agreement was carried out by the Monarch Lumber Company of Oregon deeding the premises to the Monarch Lumber Company of Maine which in turn conveyed the property to Ira M. Cobe to be held in trust for the beneficial use of the Assets Realization Company, and that when Cobe resigned as vice-president of the Assets Realization Company he transferred the lands to his successor the plaintiff. The answer and cross-complaint recites that E. W. Spencer obtained a judgment on June 5, 1913, against the Monarch Lumber Company of Oregon for $7,250; that an execution was issued on the judgment, Tracts A and B were levied upon and sold to Spencer for $7,633.60, and the sale confirmed. Bjelik also avers that after the confirmation of the sale the Assets Realization Company and its trustee Cobe arranged with Spencer to redeem the property from the sale to Spencer and that on April 1, 1914, it was agreed that

the Assets Realization Company would at once pay a portion and, upon the expiration of the period allowed subsequent judgment creditors to redeem, the company would pay the balance of an agreed amount to Spencer for the redemption of the property from his judgment; that the agreement was fulfilled by the payment of the stipulated sums to Spencer who then assigned his certificate of sale. Bjelik alleges that all the moneys paid to Spencer were furnished by the Assets Realization Company and that John Getz "was acting solely as the agent of the Assets Realization Company" and served as a mere conduit for the transfer of the certificate from Spencer to the plaintiff. The prayer of the cross-complaint in effect asks that the agreement between the Assets Realization Company and Spencer, the transfers of the Spencer Certificate of sale, and the sheriff's deed to Murphy be adjudged to be a redemption of Tracts A and B from the Spencer judgment and that the Bjelik judgment be held to be a subsisting lien upon the real property.

Replying to the cross-complaint the plaintiff alleged that on June 5, 1913, "E. W. Spencer recovered a judgment against the Monarch Lumber Company (of Oregon)" for the sum of $7,250; that an execution was issued, Tracts A and B levied upon and sold on execution to Spencer and the sale confirmed; that Spencer assigned his certificate of sale to John Getz for $8,600; that Getz transferred the certificate to the plaintiff who "became the owner of the said real property and entered into possession of the same, subject, however, to the mortgage or deed of trust in favor of the said William W. Crawford, but discharged of any claim thereon by defendants in this cause or any thereof"; that by virtue of the sheriff's deed to Murphy he "became and is the owner of said real property"; and that

the sale and sheriff's deed extinguished whatever interest Bjelik or any of the other defendants may have had.

Bjelik filed a rejoinder which, in addition to certain denials, affirmatively alleges that the escrow agreement pleaded by Murphy was made for the purpose of "clouding the true transaction had between the parties"; that the real purpose of the contract

"was to have it appear that said Spencer did not theretofore receive any money upon his said judgment * * and that said agreement was fraudulently conceived and executed for the sole purpose of misleading the subsequent judgment creditors of the Monarch Lumber Company, and to prevent the said judgment lienors redeeming said property from said sale to said Spencer and from discovering or learning that said redemption on the part of said Cobe had taken place."

The rejoinder also contained an averment to the effect that the Assets Realization Company furnished the money paid to Spencer and that Getz was a mere conduit for the Assets Realization Company.

Bjelik's claim that the Assets Realization Company furnished the money paid to Spencer is admitted by the plaintiff, for in his reply to the answer and cross-complaint of Brayton & Lawbaugh, Ltd., he

"admits that the money paid to Spencer was the money of the Assets Realization Company and that the same was advanced to said Getz and admits that said Getz acted as agent only for the Assets Realization Company."

The defendant A. C. Springer also appeared by filing an answer, but his pleading is different from the answers of the other defendants. After admitting the corporate character of one and the official character of another defendant and that certain of the defendants claim some interest in the property, Springer denies

the remainder of the complaint and alleges that his judgment is superior to any claim of the plaintiff.

At the trial counsel for plaintiff stated to the court that the deeds from the Monarch Lumber Company of Oregon to the Monarch Lumber Company of Maine, from the Monarch Lumber Company of Maine to Ira M. Cobe and from Ira M. Cobe to Grayson M. P. Murphy, were not sufficient to pass title to the plaintiff. The trial court decreed that the plaintiff did not have any title to the real property and dismissed his complaint, on the theory that: (1) Murphy did not acquire any title from the deeds executed by the Monarch Lumber Company of Oregon, the Monarch Lumber Company of Maine and Ira M. Cobe; and (2) he did not acquire title through the sheriff's deed because (a) that portion of the judgment order which provided for a judgment against the Monarch Lumber Company of Oregon was void; and (b) the levy and sale of Tracts A and B were void since the sheriff did not demand payment by the Monarch Lumber Company of Oregon before levying upon its property. The plaintiff appealed. AFFIRMED.

For appellants there was a brief over the names of *Messrs. Teal, Minor & Winfree* and *Messrs. Wilson, Neal & Rossman,* with oral arguments by *Mr. Wirt Minor* and *Mr. Oscar A. Neal.*

For respondents, Brayton & Lawbaugh, there was a brief over the names of *Mr. Hugh Montgomery* and *Messrs. Platt & Platt,* with an oral argument by *Mr. Montgomery.*

For respondents, W. T. Patton and John Bjelik, there was a brief with oral arguments by *Mr. J. W. Kaste* and *Mr. Maurice W. Seitz.*

MR. JUSTICE HARRIS delivered the opinion of the court.

The main question for decision, and the one to which counsel have given most of their attention, is whether the sale of Tracts A and B by the sheriff was void. But there is a preliminary question which must be disposed of first; and it is because of this preliminary question that an extended statement of the material facts and of the pleadings has been made. Recurring to the answers filed by Bjelik, Brayton & Lawbaugh, Ltd., and Patton, it will be observed that these defendants in effect allege that the Assets Realization Company became the real owner by reason of the deeds executed by the Monarch Lumber Company of Oregon, the Monarch Lumber Company of Maine, and Ira M. Cobe; that the Assets Realization Company was the real owner of the certificate of sale purchased from Spencer for the reason that the company furnished the money and Getz and Murphy acted as its agents; and that therefore the transfer of the Spencer certificate of sale and the delivery of a sheriff's deed to Murphy operated as a redemption by the real owner, the Assets Realization Company, from the lien of the Spencer judgment and left the subsequent judgments, held by Bjelik, Brayton & Lawbaugh, Ltd., and Patton, standing as subsisting liens. During the trial the plaintiff formally stated to the court that he did not claim title through his deed from Ira M. Cobe. None of the parties contended, at the trial in the Circuit Court, that the judgment against the Monarch Lumber Company of Oregon was a nullity; nor did any of the litigants plead, or argue or even suggest that the sale of Tracts A and B by the sheriff to Spencer was void. The trial court, however, found as a conclusion of law that the

judgment against the Monarch Lumber Company of Oregon as garnishee was void and that the levy upon and the sale of its lands were nullities because made without first demanding payment of the debt by the Monarch Lumber Company of Oregon. The plaintiff expressly disclaimed acquirement of title through the deed from Cobe; and, hence, the only claim of ownership made by him is rested upon the Spencer judgment and the sheriff's sale. Although he does not plead all the details the plaintiff does aver in his complaint and in his several replies that Spencer obtained a judgment against the Monarch Lumber Company of Oregon. The three defendants, Bjelik, Brayton & Lawbaugh, Ltd., and Patton, also affirmatively plead that Spencer obtained a judgment against the Monarch Lumber Company of Oregon. The plaintiff relies upon the Spencer judgment to create and sustain his title and to extinguish the liens of the judgments held by the defendants, while the defendants who pleaded the Spencer judgment did so for the purpose of continuing and preserving the liens of their judgments.

1–3. The plaintiff argues that Bjelik, Brayton & Lawbaugh, Ltd., and Patton, are concluded by their answers and that therefore it must be assumed that Spencer secured a valid judgment against the Monarch Lumber Company of Oregon and that the levy and sale were valid. If there were no parties to this suit except the plaintiff and these three judgment creditors and if there were no pleadings except those filed by the plaintiff and these three defendants and if the record contained no evidence concerning the Spencer judgment, then the plaintiff could successfully argue that these three defendants had admitted that Spencer obtained a valid judgment against the Monarch Lumber Company of Oregon and that Tracts A and B had

been legally sold to Spencer. But the plaintiff did not content himself by relying upon the pleadings. He offered the entire record showing every step taken from the commencement of the action by Spencer to the execution and delivery of the sheriff's deed, and it now affirmatively appears from the evidence offered by plaintiff himself that in the action prosecuted by Spencer the Monarch Lumber Company of Oregon was not a party defendant but was only a garnishee and as such admitted that it owed the Monarch Transportation Company, one of the defendants, the sum of $7,250; and it also appears that the order awarding a judgment to Spencer included a judgment against the garnishee for $7,250; and it is this judgment which the plaintiff and the three defendants in the instant suit refer to in the pleadings as the judgment against the Monarch Lumber Company of Oregon. It further appears from the evidence offered by the plaintiff that the sheriff sold Tracts A and B without first making a demand upon the garnishee to pay the debt which it had admitted was due the Monarch Transportation Company. Furthermore, these three defendants deny that Murphy is the owner or in possession of the premises. And while the pleadings speak of a judgment against the Monarch Lumber Company of Oregon and a levy and sale of the property, neither the plaintiff nor any of the defendants in terms allege that such judgment or levy or sale was valid. Moreover, the answer filed by Springer puts in issue the very facts which the plaintiff contends the other answering defendants have admitted. The admission in the answer of one defendant is not conclusive upon the other defendants: 31 Cyc. 91, 139. On his own theory, Murphy does not own Tracts A and B at all unless he acquired title through the sheriff's deed and if he did so acquire

title he is the absolute owner of the premises, subject only to the trust deed held by Crawford; but if the sheriff's deed is void then it necessarily follows that plaintiff has no title at all. Murphy must prove ownership before he can succeed against Springer; but if in his attempt to prove ownership he shows by his own evidence that the deed upon which he relies is void, he has shown that he has no title at all. It would be a legal impossibility for Murphy to be the absolute owner of the premises and at the same time be utterly without ownership: See *Murray* v. *Murphy,* 39 Miss. 214, and 31 Cyc. 337; *People* v. *Oakland Water Front Co.,* 118 Cal. 234 (50 Pac. 305); *Prichard* v. *Board of Commrs. of Morganton,* 126 N. C. 908 (36 S. E. 353, 78 Am. St. Rep. 679); *Southern Pac. R. Co.* v. *Groeck,* 68 Fed. 609; *Southern Ry. Co.* v. *Covenia,* 100 Ga. 46 (29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253); *Louisville etc. Ry. Co.* v. *Palmes,* 109 U. S. 244 (27 L. Ed. 922, 3 Sup. Ct. Rep. 193); *Griffin* v. *Augusta & Knoxville R. Co.,* 72 Ga. 423; *McLane* v. *Paschal,* 8 Tex. Civ. App. 398 (28 S. W. 711). All the defendants are similarly situated and if Murphy has no title whatever against one defendant he has none as against the others. The plaintiff claims to own and each of the defendants claims to have a lien upon the premises and each party has the burden of proving his or its claim: *Durkin* v. *Ward,* 66 Or. 335, 338 (133 Pac. 345). The plaintiff chose to offer evidence of his alleged title. He must rely upon the strength of his own title. If he himself shows that he has no title he cannot ask a court of equity to decree that to be true which his own evidence shows not to be true, even though the answers admit it to be true. If the sale by the sheriff was void then the plaintiff is not entitled to a decree saying that he does have title.

The present theory of the defendants is: (1) That the judgment against the Monarch Lumber Company of Oregon in the action prosecuted by Spencer was void for want of jurisdiction; and (2) that the levy and sale were void whether made under an execution on a judgment against the principal defendants or on a judgment against the garnishee, because (a) the judgment did not include an order for the sale of the attached debt, and (b) no demand was made upon the garnishee for the payment of the debt before the levy and sale. The defendants rest their contention upon the language of certain statutes regulating attachment proceedings and for that reason it is necessary to direct attention to such sections of the Code as are applicable here.

The plaintiff "may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered * * ": Section 295, L. O. L. After prescribing the method to be pursued when attaching real property or personal property capable of manual delivery and not in the possession of a third person, Section 300, subdivision 3, L. O. L., provides that "other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same, or if it be a debt then with the debtor * * ." From the time that a copy of the writ and notice are served any person mentioned in Section 300, subdivision 3, L. O. L., is, unless he pays the debt to the sheriff," liable to the plaintiff for the amount thereof until the attachment be discharged or any judgment recovered by him be satisfied": Section 301, L. O. L. Whenever the sheriff applies to any person mentioned in Section 300, subdivision 3, such person is required to furnish him with

a certificate designating the property in his possession belonging to the defendant or the amount of any debt owing to the defendant; and if such person refuses to give a certificate, or if the certificate given is "unsatisfactory to the plaintiff, he may be required by the court, or judge thereof, where the action is pending, to appear before him and be examined on oath concerning the same * * ": Section 303, L. O. L. If the plaintiff fails to recover a judgment the attachment is discharged: Section 309, L. O. L.; but,

"if judgment is recovered by the plaintiff, and it shall appear that property has been attached in the action * * the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him or the proceeds thereof, upon the execution * * ": Section 308, L. O. L.

The order provided for in Section 303, shall require the person to appear before the court or judge at a specified time and place, and "in the proceedings thereafter upon such order, such person * * shall be known as the garnishee": Section 314, L. O. L. After the allowance of the order requiring the garnishee to appear and be examined on oath the plaintiff must serve upon the garnishee written allegations and interrogatories "touching any of the property liable to attachment as the property of the defendant": Section 315, L. O. L.; the garnishee must return the allegations and interrogatories to the court or judge with his written answer: Section 316, L. O. L.; the plaintiff may reply to the answer, "and the issues arising thereon shall be tried as ordinary issues of fact between plaintiff and defendant": Section 319, L. O. L. If, however, the garnishee fails to answer, the court or judge may compel him to do so "or the plaintiff

may, at any time after the entry of judgment against the defendant in the action, have judgment against the garnishee for want of such answer * * ": Section 317, L. O. L. But if the garnishee answers and it appears from the answer or is found upon trial that the garnishee at the time of the service of a copy of the writ and the notice,

"had any property of the defendant's liable to attachment as provided in subdivision 3 of section 300, and as to which such garnishee * * is required to give a certificate, * * beyond the amount admitted in the certificate, or in any amount if the certificate was refused, judgment may be given against such garnishee for the value thereof in money. The garnishee may at any time before judgment discharge himself by delivering, paying or transferring the property to the sheriff": Section 320, L. O. L.

It is then provided in Section 321, L. O. L., that:

"Executions may issue upon judgments against a garnishee as upon ordinary judgments between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner * * ."

The Code provides for the issuance of an execution and prescribes the mode to be followed by the sheriff when executing the writ. Section 233, L. O. L., contains six subdivisions which point out the course to be followed when property has been attached as well as when property has not been attached. If the property attached is a debt due the defendant and the amount of the debt has been paid to the sheriff the latter indorses the amount on the execution and pays it to the clerk; if the attached property is in his custody he sells it; if no property has been attached the execution itself is authority for the sheriff to levy on the property of the judgment debtor and the sheriff makes the levy "in like manner and with like effect

as similar property is attached, as provided in Sections 300, 301 and 303," but "until a levy, property shall not be affected by the execution." So far as it is material here Section 234, L. O. L., reads thus:

"In case of property in the possession of or owing from any garnishee mentioned in section 303, the sheriff shall proceed as follows: 1. If it appear from the certificate of the garnishee that he is owing a debt to the judgment debtor, which is then due, if such debt is not paid by such garnishee to the sheriff on demand, he shall levy on the property of the garnishee for the amount thereof, in all respects as if the execution was against the property of the garnishee; but if such debt be not then due, the sheriff shall sell the same according to the certificate, as other property."

It thus appears that provision has been made for the attachment of personal property, whether it be in the possession of the defendant or in the possession of a third person; and, so too, provision has been made for the attachment of debts due or yet to become due the defendant. The framers of the Code appreciated the fact that the third person might deny that he was indebted to the defendant and consequently provision was made for ascertaining the fact "upon trial." One of three situations may follow the notice of garnishment to a third person who is indebted to the defendant: (1) The answer may disclose a debt from the third person to the defendant and that debt may (a) be due, or (b) yet to become due; (2) the answer may be unsatisfactory to the plaintiff; or (3) the third person may refuse to answer. The instant suit presents a situation where the third person, the Monarch Lumber Company of Oregon, answered a notice of garnishment by saying that it was indebted to one of the defendants, the Monarch Transportation Company, in the sum of $7,250 and that the amount was then due,

and such answer was satisfactory to the plaintiff, E. W. Spencer. The first question for decision is whether the Code requires or even permits such a judgment as was rendered against the Monarch Lumber Company of Oregon.

4. Nowhere does the Code speak of a judgment against a third person who has been garnished, except when the third person (a) refuses to answer; or (b) his answer is unsatisfactory to the plaintiff. There is no statute authorizing the court to enter a judgment against a third person if he has answered a notice of garnishment by admitting an indebtedness then due the defendant, and if the plaintiff is satisfied with such answer. In *De Witt* v. *Kelly,* 18 Or. 557, 559 (23 Pac. 666), this court said that:

"The statute does not permit a plaintiff in an attachment suit to take judgment against a garnishee on account of a debt owing by the garnishee to the defendant in the suit, except where the latter refuses to furnish to the sheriff a certificate of the indebtedness, or when the certificate given is unsatisfactory": See, also, *Adamson* v. *Frazier,* 40 Or. 273, 277, 278 (66 Pac. 810, 67 Pac. 300).

The money judgment awarded to Spencer against the Monarch Lumber Company of Oregon was a nullity; and, hence, by such judgment Spencer did not gain any right which he would not have had without such judgment: *Missouri Pac. Ry. Co.* v. *Reid,* 34 Kan. 410 (8 Pac. 846); *Conover* v. *Conover,* 17 N. J. Law, 187; *Secor* v. *Witter,* 39 Ohio St. 218, 231; *Carmer* v. *Evers,* 80 N. C. 55.

5. The defendants contend that the sheriff's sale was void because the judgment, did not include an order adjudging the attached property, the debt, to be sold to satisfy the plaintiff's demands as required by Sec-

tion 308, L. O. L. If the court had made an order directing the sheriff to sell the debt due from the Monarch Lumber Company of Oregon to the Monarch Transportation Company the order would have been a nullity. The statute neither requires nor permits the sale of a debt which a garnished third person admits he then owes to a defendant. If the debt is not yet due it is ordered sold so that the plaintiff can collect on his judgment without delay; but if the debt has matured and is due from a third person who satisfactorily answers the notice of garnishment then the plaintiff collects on his judgment against the defendant by causing an execution to issue to the sheriff who levies on the property of the third person if the debt is not paid to the sheriff on demand: *Batchellor* v. *Richardson,* 17 Or. 334, 343, 344 (21 Pac. 392). Construing Sections 233, 234, and 308, L. O. L., together it is plain that Section 308 does not contemplate an order directing the sale of a debt which has matured and is due; but it is collected for the plaintiff by the sheriff in the manner pointed out by Section 234: *Whitney* v. *Day,* 86 Or. 268 (168 Pac. 295).

We now come to the crucial question involved in the appeal. The sheriff did not demand payment of the debt due from the Monarch Lumber Company of Oregon before levying upon its property. The plaintiff takes the position that the statute is merely directory and that the failure to make a demand was only an irregularity which no one except the Monarch Lumber Company of Oregon could at any time have objected to, and that even the company could not now complain of the failure of the sheriff to demand payment of the debt and thus defeat the sheriff's deed: 17 Cyc. 1114. The defendants contend that the statute is mandatory and that a demand is jurisdictional; that a levy with-

out a prior demand of payment is void; and that therefore the defendants can question the sheriff's deed and defeat it by showing a void levy, since the validity of the deed depends upon the validity of the levy: 17 Cyc. 1201; 10 R. C. L. 1334, 1335; *McRae* v. *Daviner,* 8 Or. 63. If the failure to make demand was only an irregularity of which no person could at any time complain except the Monarch Lumber Company of Oregon, then as against these defendants the sheriff's deed passed a fee-simple title to Murphy and extinguished the liens of the subsequent judgments; but if, upon the other hand, the failure to demand payment rendered the levy void then the sheriff's deed did not pass any title to Murphy and the judgments owned by the defendants are subsisting liens upon Tracts A and B.

6–9. Attachment proceedings are statutory. It is generally stated that these statutes must be strictly followed: *Schneider* v. *Sears,* 13 Or. 69, 74 (8 Pac. 841); *Batchellor* v. *Richardson,* 17 Or. 334, 346 (21 Pac. 392); *Spores* v. *Maude,* 81 Or. 11, 15 (158 Pac. 169); *California Trojan Powder Co.* v. *Wadhams & Co.,* 85 Or. 307 (166 Pac. 759); and the substantial requirements of the statute must be complied with: *Case* v. *Noyes,* 16 Or. 329, 333 (19 Pac. 104). In *Batchellor* v. *Richardson,* 17 Or. 334, 341 (21 Pac. 392), this court said:

"It is an inflexible rule of law that title to property cannot be divested out of one person, and invested in another, by proceedings *in invitum,* unless such proceedings are strictly complied with."

The property of the Monarch Lumber Company of Oregon was taken to pay the debt of its creditor. The Monarch Lumber Company of Oregon was not a party to the action prosecuted by Spencer. The notice of garnishment only operated to place the corporation in the position of a stakeholder with a contingent per-

sonal liability to the plaintiff which only ripened when a judgment was obtained against the defendants in the action: *Altona* v. *Dabney,* 37 Or. 334, 336 (62 Pac. 521); *Barr* v. *Warner,* 38 Or. 109, 112 (62 Pac. 899); *Fraley* v. *Hoban,* 69 Or. 180, 186 (133 Pac. 1190, 137 Pac. 751); *Price* v. *The Boot Shop,* 75 Or. 343, 347 (146 Pac. 1088). The garnishment did not create a lien in favor of Spencer upon any money in the hands of the Monarch Lumber Company of Oregon, nor upon any property owned by it, but it gave rise to a contingent personal liability to respond to any judgment that might afterward be recovered by Spencer against his debtor and the Monarch Lumber Company's creditor: *Barr* v. *Warner,* 38 Or. 109, 112 (62 Pac. 899); *Montana Nat. Bank* v. *Merchants' Nat. Bank,* 19 Mont. 586 (49 Pac. 149, 61 Am. St. Rep. 532). When Spencer finally secured a judgment even it did not create a lien upon any property owned by the Monarch Lumber Company because the only judgment that he was entitled to was a judgment against the makers of the note. If the instant case presented a situation where the property of a judgment debtor had been levied upon and sold without first demanding payment as directed by some statute, there would be substantial grounds upon which to base a conclusion that the statute was merely directory and that a failure to observe it was only an irregularity of which the defendants could not complain: *Dow* v. *Smith,* 6 Vt. 519; *Collins* v. *Perkins,* 31 Vt. 624; *Solomon* v. *Peters,* 37 Ga. 251 (92 Am. Dec. 69); *Rock* v. *Haas,* 110 Ill. 528; *Odle* v. *Frost,* 59 Tex. 684; *Hobein* v. *Murphy,* 20 Mo. 447 (64 Am. Dec. 194); *Luther* v. *Clay,* 100 Ga. 236 (28 S. E. 46, 39 L. R. A. 96). But see: *Dutton* v. *Tracy,* 4 Conn. 365. When a person is a party to an action and becomes a judgment debtor the law assumes that he

knows of the judgment and of what follows: *Ayres* v. *Campbell,* 9 Iowa, 213 (74 Am. Dec. 346). But the Monarch Lumber Company was not a party to the action nor was it a judgment debtor. At no time before the issuance of the execution did Spencer acquire a lien upon any property owned by the Monarch Lumber Company of Oregon. At the most Spencer only acquired the right to compel the Monarch Lumber Company of Oregon to pay to him the debt which the lumber company owed to the Monarch Transportation Company and when the statute gave the right it also prescribed the mode for the exercise of the right. A levy upon and sale of property owned by a person in the situation of the Monarch Lumber Company of Oregon is a pure proceeding *in invitum* and the requirements of the statute ought to be strictly followed. The authority of the sheriff is not brought into existence until he first demands payment of the debt. When the Code of Civil Procedure was framed and adopted in 1862 the legislature recognized the difference between the situation occupied by a judgment debtor and that occupied by a third person who owes a matured debt, by permitting a levy upon the property of the former without first demanding payment and by requiring a demand upon the latter before levying upon his property. The answer of a third person who admits a matured indebtedness to the defendant, by analogy, takes the place of an answer by a defendant who admits an indebtedness to the plaintiff, but with this difference: In the latter case the answer authorizes a judgment against the person answering, while in the former instance it does not warrant a judgment. When property of a judgment debtor is levied upon on the faith of an execution the writ and the levy are supported by a judgment, but when property of a third person

is levied upon the levy is not supported by a judgment against that third person. In other words, the demand prescribed by Section 234, L. O. L., performs the duty of a judgment and therefore as against the third person the demand should be held to be just as essential as a judgment is as against the defendant. On the one hand an execution and levy, without a judgment, would be void; and upon the other hand an execution and a levy without a demand are likewise void. The right of levy flows from the statute and the right cannot be said to exist unless the statute which makes it possible to exist has first been complied with. In brief, the demand is jurisdictional; it is mandatory and not merely directory. The sheriff's deed did not pass title to Murphy. While it would have been proper to have made entries in the journal giving an account of the manner in which the sheriff executed the writ of attachment, reciting the answer of the Monarch Lumber Company of Oregon, and, when judgment was rendered against the defendants, directing the sheriff to proceed in accordance with Section 234, L. O. L., nevertheless it was not proper to enter a money judgment against the Monarch Lumber Company of Oregon; nor would it have been proper to have ordered a sale of the attached debt. The decree of the trial court is affirmed. AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Rehearing denied February 13, 1918.

PETITION FOR REHEARING.

(170 Pac. 723.)

Messrs. Teal, Minor & Winfree and *Messrs. Wilson, Neal & Rossman,* for the petition.

Mr. Hugh Montgomery, Messrs. Platt & Platt, Mr. J. W. Kaste and *Mr. Maurice W. Seitz, contra.*

Department 1. MR. JUSTICE HARRIS delivered the opinion of the court.

The learning displayed by the attorneys for the appellant in their petition for a rehearing and the earnestness with which they have urged their contentions, the new arguments advanced, the amount involved in the controversy and the importance of the questions litigated, all combine to demand further discussion of what was treated in the original opinion as the crucial question presented by the appeal. It is true that the record does not affirmatively show that the sheriff did not demand payment of the debt due from the Monarch Lumber Company of Oregon before levying upon its property; but it is also true that the record does not affirmatively show that the sheriff did demand payment of the debt. The return made by the sheriff on the writ of execution shows that he complied with every requirement of the statutes, except making a demand upon the Monarch Lumber Company of Oregon for payment of the amount of its debt to one of the judgment debtors, the Monarch Transportation Company. The entire judgment-roll in the action prosecuted by Spencer together with the writ of execution and the sheriff's return, the order confirming the sale, the sheriff's certificate of sale and the as-

signments of it, and the sheriff's deed, were all introduced in evidence by the plaintiff, and an examination of the record will disclose that not only the return made upon the writ of execution but also the entire record is silent upon the subject of whether a demand was made upon the Monarch Lumber Company of Oregon for payment of its debt before a levy was made by the sheriff upon its property, although all the details of the act of making the levy as well as of the sale of the property fully appear in the record. The respondents gave ample notice in their printed brief that they would insist that the sale was void because no demand had been made upon the Monarch Lumber Company of Oregon. It is not now and never has been contended that a demand was in fact made, although it is now argued by the petitioner that, since there is no evidence affirmatively showing a failure to make a demand, the presumption is that the sheriff performed his duty by demanding payment from the Monarch Lumber Company of Oregon. It was not intended to announce in the original opinion that the evidence affirmatively disclosed that a demand was not made and any language which directly or indirectly suggests that the evidence affirmatively proves a failure to make a demand, is inapt, because as already stated the record is merely silent upon the subject. However, the conclusion reached in the original opinion was predicated upon the theory that the making of a demand was mandatory and not merely directory, that it was a jurisdictional prerequisite, and that unless it affirmatively appeared upon the record that the sheriff had first demanded that the Monarch Lumber Company of Oregon pay its debt, a levy upon and sale of the company's property was utterly void.

The appellant insists that the court had authority to render a judgment against the Monarch Lumber Company of Oregon. We have again examined the question from every angle and carefully considered every argument advanced by the appellant, but we come to the same conclusion that was reached in the original opinion. Every section of the Code which can in any wise be applicable to any phase of the question is a component part of the Civil Code which was adopted in 1862 as framed by the Code commissioners. The Code was written as an harmonious whole and it was not the work of persons writing at different times or at cross-purposes. Examining this Code as an harmonious whole it will be seen that nowhere has it in terms conferred authority for rendering a judgment against a garnished third person when the attaching plaintiff is satisfied with the third person's certificate that he owes a matured debt to a defendant in the action. Not only does the Code fail to confer the authority in express terms but every implication to be derived from the language found in it persistently points to a withholding rather than a granting of the authority. Express provision is made for a judgment against a garnishee who refuses to give a certificate or who gives an unsatisfactory certificate, and the very fact that such authority is expressly given in these two specified instances is by implication a withholding of authority to enter a judgment against a garnished person who satisfactorily certifies that he owes a matured debt to a defendant in the action. Provision is not only made for a judgment against a garnishee who refuses to make a certificate or who gives an unsatisfactory one, but express provision is also made for the issuance of an execution upon that judgment "as upon ordinary judgments between

plaintiff and defendant'': Section 321, L. O. L. There is no provision whatever for an execution against a garnished person who stands in the position of the Monarch Lumber Company of Oregon and hence to reach a matured debt owing from such garnished person, one must look elsewhere to see whether any provision has been made.

10. There are three kinds of executions: ''one against the property of the *judgment debtor,*'' another against his person, and the third for the delivery of specific property or damages for withholding it: Section 214, L. O. L. The plaintiff in the action can have an execution issued by the clerk ''against the property of the judgment debtor'' and ''it shall contain the name of the court, the names of the parties to the action, and the title thereof; it shall substantially describe the judgment.'' The writ of execution is then delivered to the sheriff who executes it in the manner provided by Sections 233 and 234; but it must be borne in mind that the writ with which the sheriff is armed is a writ of execution ''against the property of the judgment debtor,'' in the action. If it appears from the certificate of the garnished third person that he is owing a matured debt to the judgment debtor in the action, then the sheriff who is armed with this writ of execution ''against the property of the judgment debtor,'' if such debt is not paid on demand, must levy on the property of the garnished third person, in all respects as if the execution was against the property of such third person: Section 234, L. O. L. The sheriff is not directed to look to a judgment against the third person to discover whether the latter owes a defendant in the action, but the officer is required to look to the certificate. There is no provision for a writ of execution against the property of a garnished third per-

son who has satisfactorily certified that he owes a matured debt to a defendant in the action but the only provision made by the Code is a writ of execution against the property of the judgment debtor in the action and this writ is executed just as if it were against the property of the garnished third person. The very form of the writ precludes all notion of a judgment against the garnished third person. The fact that provision is expressly made for a judgment against a garnished person who gives an unsatisfactory certificate or refuses to give any certificate and no express provision is made for a judgment against a third person who satisfactorily certifies that he owes a matured debt to a defendant in the action; the fact that express provision is made for the issuance of a writ of execution on an expressly authorized judgment against a garnishee and no other express provision is made for a writ of execution to enforce collection from a garnished person except the general provision for the issuance of a writ of execution against the property of the judgment debtor in an action; the fact that the writ of execution mentioned in Sections 233 and 234, L. O. L., runs against the property of the judgment debtor in the action and must contain the information specified by Section 215, L. O. L.; the fact that there is nowhere any provision for an execution against the property of a third person in the situation of the Monarch Lumber Company of Oregon; and the fact that Section 234, L. O. L., directs the sheriff to look to the certificate of the third person instead of a judgment against such third person to see whether that third person owes the judgment debtor against whose property the writ runs, are facts which, when viewed separately are very persuasive, but when combined and considered together lead with almost ir-

resistible force to the conclusion that the Code does not contemplate the entry of a judgment against a third person in the situation of the Monarch Lumber Company of Oregon.

11. There is yet another circumstance that is highly significant. It is true that by the terms of Section 301, L. O. L., a garnished third person is from the time of the service of a copy of the writ and notice, liable to the plaintiff until the attachment be discharged or the judgment be satisfied, but it is also true that this service of the writ and notice does not confer jurisdiction over the person of a garnishee so as to authorize the entry of a judgment against such garnishee, because the order prescribed in Section 303, L. O. L., must be obtained and served before the court acquires jurisdiction to render a judgment against a garnishee who either refuses to give a certificate or gives an unsatisfactory certificate: *Carter* v. *Koshland*, 12 Or. 492, 497 (8 Pac. 556); *McLaughlin* v. *Aumsville Merc. Co.*, 74 Or. 80, 89 (144 Pac. 1154); *Smith* v. *Conrad*, 23 Or. 206, 212 (31 Pac. 398). To require the service of the order prescribed by Section 303, L. O. L., as a jurisdictional prerequisite is to require ridiculous and wasteful excess, if it can be said that service of a notice of garnishment and a copy of the writ of attachment confers jurisdiction over the person of the garnishee so as to authorize a judgment against him. If service of the writ and notice confers jurisdiction, then service of the order specified by Section 303, L. O. L., would not make more complete what was already complete.

12. The appellant invokes the aid of Section 983, L. O. L., and argues that this section of the Code authorizes a judgment against the Monarch Lumber Company of Oregon. This section only applies where jurisdiction is conferred on a court or judicial officer. The

section cannot itself be the source of jurisdiction, for it is only available to carry jurisdiction into effect after jurisdiction has first been conferred by the Constitution or some statute. There is no statute expressly authorizing a judgment against a person in the position of the Monarch Lumber Company of Oregon and every implication to be derived from the several statutes points to the conclusion that the Code does not contemplate the entry of such a judgment. If a judgment is to be entered, why is there no provision for an execution against the property of the third person? "The course of proceeding," to use the language of Section 983, L. O. L., is "specifically pointed out by this Code," for in the plainest terms it provides for an execution against the property of the judgment debtor in the action, and then, if the debt due from the garnished third person is not paid upon demand, the sheriff can, on the authority of this writ, levy upon the property of that person in all respects as if the execution were against his property. The language of Section 234, L. O. L., is unequivocal; it construes itself.

13. In the original opinion it is said that

"the demand prescribed by Section 234, L. O. L., performs the duty of a judgment, and therefore as against the third person the demand should be held to be just as essential as a judgment is as against the defendant."

We did not decide and do not now determine whether the statute is constitutional, but the quoted language was employed solely for the purpose of emphasizing the necessity of making a demand. If it be suggested by the appellant that to take the property of the Monarch Lumber Company of Oregon without a judgment against it is to take its property without due process of law then, since there is no authority for a judgment, the levy and sale were necessarily void, even though

it be assumed that the levy was preceded by a demand for payment of the debt. But assuming, without deciding, that the procedure affords due process of law, it can readily be seen that, if there is no authority for a judgment against the garnished person, the demand is an indispensable prerequisite.

14–16. The appellant places much reliance upon the order of the Circuit Court confirming the sale. If the statute authorized the entry of a judgment against a person in the position of the Monarch Lumber Company of Oregon and made provision for the issuance of an execution on that judgment, then cases like *Bank of Colfax* v. *Richardson,* 34 Or. 518 (54 Pac. 359, 75 Am. St. Rep. 664), and *Voorhees* v. *Jackson,* 35 U. S. (10 Pet.) 449 (9 L. Ed. 490) might be apropos. The Circuit Court is a superior court of record and it is true that when a judgment of such a court relating to a matter falling within the general scope of its powers is produced, the judgment generally proves itself and in the absence of affirmative evidence to the contrary, jurisdiction will usually be presumed; but, on the other hand, if in rendering the judgment the court was not proceeding according to the course of the common law, as where it was exercising special powers not brought into action according to the course of the common law, jurisdiction will not be presumed, but must be made affirmatively to appear on the face of the record. This doctrine is expressly recognized in *Bank of Colfax* v. *Richardson,* 34 Or. 518 (54 Pac. 359, 75 Am. St. Rep. 664), and has been applied in *Willamette Real Estate Co.* v. *Hendrix,* 28 Or. 485, 494 (42 Pac. 514, 52 Am. St. Rep. 800); *Mertens* v. *Northern State Bank,* 68 Or. 273 (135 Pac. 885). As stated by appellant in his petition for a rehearing, "the statute in regard to garnishment is anomalous." In the instant case there

was no authority for a judgment against the Monarch Lumber Company of Oregon and hence the attempted judgment was a nullity and in contemplation of law there was no judgment at all. The only judgment provided for by statute is the judgment against the defendants in the action. The only writ provided for is a writ of execution against the property of the judgment debtor and it is this writ that serves as the sheriff's authority to levy upon the property of the garnished person.

17. The Monarch Transportation Company is at once the judgment debtor of Spencer, and the creditor of the Monarch Lumber Company of Oregon. The Monarch Transportation Company could not, without a judgment against its debtor, the Monarch Lumber Company of Oregon, compel the payment of the debt due from the latter to the former; and yet Section 234, L. O. L., contemplates that Spencer can compel the payment of that debt, even though neither Spencer nor the Monarch Transportation Company has a judgment against the Monarch Lumber Company of Oregon. In other words, the statute enables Spencer to accomplish without a judgment against the Monarch Lumber Company of Oregon what could only be accomplished by the Monarch Transportation Company with a judgment. The authority to seize the property of the Monarch Lumber Company of Oregon could have been brought into existence only by first making a demand upon the Monarch Lumber Company of Oregon to pay its debt, and since the record does not affirmatively show that the authority was brought into existence, the levy and sale were void. While we neither decide nor intimate that the statute is unconstitutional, yet if it is defective or invalid the remedy is with the legis-

lature and not with the courts. The petition for a rehearing is denied. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON, and MR. JUSTICE BURNETT concur.

Argued October 4, affirmed December 27, 1917, rehearing denied February 13, 1918.

BRAYTON & LAWBAUGH *v.* MONARCH LUMBER CO.

(169 Pac. 528; 170 Pac. 717.)

Corporations—Creditors' Suit—Avoiding Mortgage—Fraud—Evidence.

1. Evidence, in suit by nonsecured creditors of a corporation to defeat or reduce the amount of its mortgage, *held* to show the indebtedness represented by the mortgage and secured notes to be free from fraud.

Usury—Persons Entitled to Take Advantage.

2. Even if the notes secured by a mortgage be usurious, this cannot, to the extent of the principal, avail a subsequent judgment creditor of the mortgagor; the debt without interest being under Section 6030, L. O. L., payable to the state for the school fund, and the mortgage being a mere incident of the debt.

Usury—Forfeiture—Suit for Determination.

3. The suit in which under Section 6030, L. O. L., it can be determined that mortgage notes are usurious, and the principal payable to the state for the school fund, is one on the mortgage or notes.

Corporations—Creditors' Suit—Avoiding Deed.

4. Conveyances by an insolvent corporation of all its assets to another corporation without property, consideration for which failed, and conveyances of such property by the second corporation without authorization to the mortgagees of the first corporation, knowing of the circumstances, are properly annulled at suit of the creditors of the first corporation.

Mortgages—Receiver—Mortgagee in Possession.

5. Receiver of mortgaged property of an insolvent is properly appointed at suit of mortgagor's creditors, though the mortgagee or its alienee be rightfully in possession; both being insolvent, and the expenses of caring for property exceeding receipts from sales and rentals.

[As to when receivers may be appointed to take care of mortgaged property, see note in 72 **Am. St. Rep.** 74.]

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

Brayton & Lawbaugh, Ltd., a corporation, brought this suit against the Monarch Lumber Company, a corporation organized under the laws of Oregon, the Monarch Lumber Company, a corporation created under the laws of Maine, the Assets Realization Company, a New Jersey corporation with an office in Chicago, William W. Crawford as an individual and as a trustee, W. T. Patton and John Bjelik. The Assets Realization Company, its agents and trustees Ira M. Cobe, Grayson M. P. Murphy and William W. Crawford on the one side and the judgment creditors of the Monarch Lumber Company of Oregon on the other side, have been litigating the title and possession of property which was once owned by the Monarch Lumber Company of Oregon. The litigation embraces two suits: this one and also the one prosecuted by Grayson M. P. Murphy against John Bjelik, W. T. Patton, Brayton & Lawbaugh, Ltd., and A. C. Springer. The suit brought by Murphy resulted in a decree in this court adjudging that a sheriff's deed, relied upon by him, was void for the reason that the precedent levy was void. Although our opinion rendered this day in the Murphy case contains a lengthy statement of all the facts involved there, it will nevertheless be necessary here not only to restate some of the facts but also to give a more detailed account of several transactions.

The Monarch Lumber Company of Oregon was the owner of real estate on Oregon Slough upon which was located a modern sawmill plant with a capacity of 300,000 feet per ten hours. In addition to the sawmill plant which included a planing mill, dry-kilns and such appliances and equipment as are usually found

with a modern sawmill, the company owned a block of ground in Kenton which was used as a retail lumber-yard. It also had on hand at all times a considerable quantity of manufactured lumber and it operated retail lumber yards at different places in the state. In this as in the Murphy suit the Oregon Slough property will be referred to as Tract A and the Kenton property will be designated as Tract B.

Under date of September 1, 1911, the Monarch Lumber Company of Oregon executed twelve promissory notes payable, to the order of itself, on September 1, 1912, with interest until maturity at the rate of six per cent per annum and at the rate of seven per cent per annum after maturity. The twelve notes were for the aggregate sum of $300,000, each being for the principal sum of $25,000. The Monarch Lumber Company of Oregon secured these notes by executing to William W. Crawford, trustee, a trust deed, hereinafter called a mortgage, bearing date September 1, 1911, and covering Tracts A and B as well as all other property owned by the company. The maker of the notes indorsed each of them. Each note was indorsed and guaranteed by the David Investment Company, a corporation, and by Lester W. David. The Assets Realization Company acquired the notes and became the owner of them.

The Monarch Lumber Company of Oregon conveyed Tract A to the Monarch Lumber Company of Maine by a deed which is dated July 30, 1913, and was recorded July 31, 1913. The Monarch Lumber Company of Oregon transferred all its personal property to the Monarch Lumber Company of Maine by a bill of sale dated July 30, 1913, and filed for record on August 14, 1913. Tract B was transferred to the Monarch Lumber Company of Maine by the Monarch Lumber Com-

pany of Oregon by a deed which is dated August 4, 1913, and was recorded September 6, 1913.

The Monarch Lumber Company of Maine conveyed Tracts A and B to Ira M. Cobe by a deed dated September 4, 1913, and recorded September 6, 1913, and transferred all the personal property to Ira M. Cobe by a bill of sale which is likewise dated September 4, 1913, and was recorded September 6, 1913. Cobe deeded Tracts A and B to Grayson M. P. Murphy by an instrument dated January 22, 1915.

Ira M. Cobe was one of the vice-presidents of the Assets Realization Company. He severed his connection with the company about October, 1914, and was succeeded by Grayson M. P. Murphy. When the Monarch Lumber Company of Maine transferred all the personalty and Tracts A and B to Cobe he took charge of the property and from time to time sold lumber and other articles of personal property; and when Cobe conveyed to Murphy the latter continued to sell such part of the personal property as he could dispose of. Cobe and Murphy acted as trustees for the Assets Realization Company and their acts may be regarded as the acts of that company.

Although the Spencer judgment, the sale of Tracts A and B under the execution issued on the Spencer judgment, and the sheriff's deed to Murphy are referred to in some of the pleadings in the instant suit, no statement need here be made of the facts involved in the sheriff's deed to Murphy for the reason that a complete account of that transaction may be found in the opinion which we have this day rendered holding that the sheriff's deed is void. Eliminating all that is said about the sheriff's deed to Murphy, we can now attempt to give the substance of the numerous plead-

ings as we find them in 170 printed pages of the abstract.

The plaintiff Brayton & Laubaugh, Ltd., alleges that it commenced an action against the Monarch Lumber Company of Oregon on August 13, 1913, and on that day attached Tract A and that on December 8, 1913, the action culminated in a judgment and order of sale of attached property; that the Monarch Lumber Company of Oregon owed more than half a million dollars to different persons, firms and corporations including an indebtedness of $200,000 to the Assets Realization Company; that the Monarch Lumber Company of Oregon, the Assets Realization Company, William W. Crawford and Ira M. Cobe entered into a conspiracy to give the Assets Realization Company a preference and to defraud the other creditors; that in pursuance of such conspiracy the notes and mortgage were given for $300,000 and that consequently the excess above $200,000 is usurious and fraudulent. The complaint also alleges that in furtherance of the conspiracy to defraud creditors the Monarch Lumber Company of Oregon, the Assets Realization Company, Ira M. Cobe and William W. Crawford caused the Monarch Lumber Company of Maine to be organized and then caused the assets of the Monarch Lumber Company of Oregon to be transferred to the Monarch Lumber Company of Maine. The plaintiff also charges that the deed and bill of sale to Cobe were made for the purpose of defrauding the creditors of the Monarch Lumber Company of Oregon. The complaint concludes with a prayer for the annulment of the deeds and bills of sale, a cancellation of the mortgage and of the notes held by the Assets Realization Company and that the amount of its claim be ascertained and reduced to a general instead of a preferred claim against the Mon-

arch Lumber Company of Oregon, and for an accounting by Cobe, Murphy, Crawford and the Assets Realization Company.

The answering defendants are W. T. Patton who obtained a judgment against the Monarch Lumber Company of Oregon on September 5, 1913, John Bjelik a judgment creditor of the Monarch Lumber Company of Oregon, William W. Crawford, individually and as trustee, the Monarch Lumber Company of Oregon and the Monarch Lumber Company of Maine, and the Assets Realization Company. The answer which Crawford filed to the complaint is a denial of the charge of conspiracy and a recital by way of admissions and allegations of the execution of the mortgage to him. His prayer is for a dismissal of the complaint.

The Assets Realization Company answered the complaint by alleging that the Monarch Lumber Company of Oregon executed the notes and mortgage for the purpose of funding its indebtedness; that the David Investment Company agreed to purchase the notes and to pay $264,000 cash and allow a credit of $36,000 on an indebtedness of approximately $57,000 then owing from the Monarch Lumber Company of Oregon to the David Investment Company; that the Monarch Lumber Company of Oregon was a going concern owning property worth $500,000; that the transfers to the Monarch Lumber Company of Maine were not made for the purpose of defrauding creditors but that they were made with the consent of the creditors and for the avowed purpose of providing means for the payment of the creditors; that the transfers to Cobe were not made in discharge of the notes held by the Assets Realization Company but that they were executed for the purpose of putting Cobe in possession of the property as an agent of Crawford, the trustee who held the

mortgage, and that accordingly Cobe took possession, cared for the property and from time to time sold personalty, using the proceeds to pay expenses. The prayer is that the complaint be dismissed.

The Monarch Lumber Company of Oregon and the Monarch Lumber Company of Maine joined in an answer which concludes with a prayer for the dismissal of the complaint.

W. T. Patton and John Bjelik each filed an answer and a cross-complaint. Patton secured a judgment for $803.95 against the Monarch Lumber Company of Oregon. The judgment was docketed on September 5, 1913, and an execution was issued and Tracts A and B were sold on November 17, 1913, by the sheriff to W. T. Patton for $837.68. The sale was confirmed on December 24, 1913, and on December 26, 1914, a sheriff's deed was delivered to Patton and the instrument was recorded on January 28, 1915. Bjelik recovered a judgment for $3,084.65 against the Monarch Lumber Company of Oregon on June 30, 1913, for an injury which was sustained on December 26, 1912.

The answer and cross-complaint interposed by Patton recites the judgment recovered by him, the sale of Tracts A and B on the execution issued upon his judgment and the delivery of the sheriff's deed to him. Patton then avers that the Monarch Lumber Company of Oregon and the Assets Realization Company agreed that the former would convey its assets to the latter in satisfaction of the indebtedness owing from the lumber company and that the agreement was carried out by the transfer to the Monarch Lumber Company of Maine which in turn conveyed to Cobe who held as a trustee for the Assets Realization Company. The prayer is that Patton be deemed to be the owner of

Tracts A and B freed from any claim of the Assets Realization Company or its agents Cobe and Murphy.

The Monarch Lumber Company of Oregon and the Monarch Lumber Company of Maine joined in an answer to the Patton cross-complaint, by alleging that the conveyances from the former to the latter company were with the consent of the creditors of the Monarch Lumber Company of Oregon; and that the transfers to Cobe were as further security for the notes held by the Assets Realization Company.

William W. Crawford and the Assets Realization Company joined in an answer to the Patton cross-complaint. This answer repeats the claim that the conveyances to the Monarch Lumber Company of Maine were made with the consent of the creditors of the Monarch Lumber Company of Oregon and that the property was then transferred to Cobe as further security for the notes owned by the Assets Realization Company. A complete account is given of their version of the execution of the notes and mortgage, the indorsements made upon the paper and the acquirement of the notes by the Assets Realization Company.

The answer and cross-complaint submitted by Bjelik is much like the answer and cross-complaint submitted by Patton and yet there are some differences between the two pleadings. Bjelik pleads his judgment against the Monarch Lumber Company of Oregon. He alleges that the notes and mortgage were given for a bonus of $36,000 and that they are usurious; that in 1913 the Monarch Lumber Company of Oregon was hopelessly insolvent; that Cobe, the Assets Realization Company and the Monarch Lumber Company of Oregon caused the Monarch Lumber Company of Maine to be created so that it could take over all the assets of the Monarch Lumber Company of Oregon under a plan of reorgan-

ization which contemplated the sale of stock to be issued by the Monarch Lumber Company of Maine and the application of the proceeds of such sale to the claims of creditors of the Monarch Lumber Company of Oregon; that the assets were all conveyed to Cobe before any sales could be made of the stock issued by the Monarch Lumber Company of Maine; and that the conveyances as actually made to the Monarch Lumber Company of Maine and to Cobe were in fraud of the creditors of the Monarch Lumber Company of Oregon. This pleading prays that the conveyances to the Monarch Lumber Company of Maine and to Cobe be declared to have been made to defraud the creditors of the Monarch Lumber Company of Oregon; that Tracts A and B and the remaining personalty be decreed to be the property of the Monarch Lumber Company of Oregon; that Cobe, Murphy and the Assets Realization Company be required to account for the moneys received by them from the sales of lumber and other property; and that a receiver be appointed.

The Monarch Lumber Company of Oregon and the Monarch Lumber Company of Maine answered Bjelik by reiterating the allegations made by them in other pleadings to the effect that the transfers to the Monarch Lumber Company of Maine and to Cobe were made with the consent of the creditors and that Cobe took the property as further security.

The answer of the Assets Realization Company and Crawford is much like their answer to the Patton cross-complaint. They aver that the conveyances received by the Monarch Lumber Company of Maine and by Cobe were executed with the consent of the creditors and that Cobe took possession of the property as agent for William W. Crawford, the trustee, and the Assets Realization Company, the owner of the notes, and for

the purpose of enabling him to dispose of such portions of the personalty as were not required in the maintenance of the mortgaged property and to use the proceeds of sale for the care, protection and maintenance of the remaining property.

After this suit had been commenced and during its pendency, on the separate motions of Bjelik and Patton the court appointed a receiver to take charge of all the property involved in this suit.

A trial resulted in a decree annulling the deeds to the Monarch Lumber Company of Maine, the deed to Cobe and the deed to Murphy; declaring that the Bjelik judgment is a valid lien on Tracts A and B and that the Brayton & Lawbaugh, Ltd., judgment is a lien upon Tract A; and adjudging that W. T. Patton owned Tracts A and B free from claims on the part of the Monarch Lumber Company of Oregon, the Monarch Lumber Company of Maine, Ira M. Cobe and Grayson M. P. Murphy, but subject, however, to the judgment liens in favor of Bjelik and Brayton & Lawbaugh, Ltd. The decree also gives certain directions to the receiver. Although the trial court found that the transactions between the Monarch Lumber Company of Oregon, the David Investment Company, Lester W. David and the Assets Realization Company constituted a loan of money by the Assets Realization Company to the Monarch Lumber Company of Oregon, yet no express reference is made in the decree to the notes or mortgage. The Assets Realization Company, William W. Crawford, individually and as trustee, the Monarch Lumber Company of Oregon and the Monarch Lumber Company of Maine appealed. AFFIRMED.

For appellants there was a brief over the names of *Messrs. Teal, Minor & Winfree* and *Messrs. Wilson,*

Neal & Rossman, with oral arguments by *Mr. Wirt Minor* and *Mr. Oscar A. Neal.*

For respondents, Brayton & Lawbaugh, there was a brief over the names of *Mr. Hugh Montgomery* and *Messrs. Platt & Platt,* with an oral argument by *Mr. Montgomery.*

For respondents, W. T. Patton and John Bjelik, there was a brief with oral arguments by *Mr. J. W. Kaste* and *Mr. Maurice W. Seitz.*

MR. JUSTICE HARRIS delivered the opinion of the court.

In the final analysis, the contest here, as in the Murphy suit, is one between judgment creditors on the one side and the Assets Realization Company on the other. Our opinion in the Murphy suit disposed of the questions arising out of the Spencer judgment, and hence the instant proceeding may be regarded as the complement of the Murphy suit, for this contest involves the remaining phases of the litigation between the parties. Since it was determined in the Murphy suit that the sheriff's deed to Murphy was void, it follows that the Assets Realization Company must now rest its claims upon the notes and mortgage and the conveyances to Cobe and Murphy. It must be remembered that the notes and mortgage were executed in September, 1911, and hence are prior to the respective judgments obtained by Bjelik on June 30, 1913, by Patton on September 5, 1913, and by Brayton & Lawbaugh, Ltd., on December 8, 1913. Throughout the discussion it must be kept in mind that Crawford is merely a trustee holding the mortgage for the benefit of the owner of the notes; and that both Cobe and Murphy at all times stood in the position of agents and

trustees for the Assets Realization Company. For all practical purposes the transfers to Cobe and the conveyances to Murphy were transfers and conveyances to the Assets Realization Company. The main questions yet to be decided relate: (1) To the indebtedness represented by the notes and mortgage; (2) to the validity and effect of the deeds and bill of sale to the Monarch Lumber Company of Maine and the subsequent transfers to Cobe and Murphy; and (3) the validity of the appointment of the receiver. These three questions will be discussed in the order named.

1. The inquiry concerning the notes and mortgage necessarily involves a statement of the relationships between the persons and corporations dealing with the paper, as well as the financial condition of the maker of the notes. The Monarch Lumber Company of Oregon had completed a modern sawmill plant; and, while the evidence fails to disclose the exact amount, we infer from the scattered references in the transcript of the evidence and from statements in the briefs, that the company owed about $250,000. The lumber company did not own any timber; and hence being heavily in debt and without logs to saw, it became necessary to procure money so that it could not only pay its existing indebtedness but could also operate the mill. The David Investment Company was a Washington corporation capitalized at $2,000,000 with a paid-up capital of about $1,600,000. Lester W. David owned about three-fourths of the stock issued by the David Investment Company and was the president of it. Lester W. David was also the president of the Monarch Lumber Company of Oregon. The David Investment Company owned about three-fourths of the stock issued by the Monarch Lumber Company of Oregon; and therefore Lester W. David was for all

practical purposes the owner of both companies since he owned three-fourths of the stock of the David Investment Company and that company in turn owned about three-fourths of the stock of the Monarch Lumber Company of Oregon. The David Investment Company had advanced moneys from time to time to the Monarch Lumber Company of Oregon and the latter owed the former company about $57,000. An officer and stockholder of the David Investment Company went to Chicago and interviewed the Assets Realization Company about a loan. He was followed by Lester W. David who, upon his arrival in Chicago, conducted the negotiations with the Assets Realization Company. The negotiations continued for several weeks. The Assets Realization Company sent an appraiser to Oregon to inspect and report upon the holdings of the Monarch Lumber Company of Oregon; and after inspecting the properties and examining the books of the lumber company and those of the David Investment Company he reported to the Assets Realization Company, giving the result of his examination and stating that the property would probably sell at quick sale for $500,000, and that the David Investment Company was a creditor of the Monarch Lumber Company of Oregon.

The notes and mortgage were prepared in August, 1911, are dated September 1, 1911, and were executed on or before September 16, 1911. Under date of September 18, 1911, the David Investment Company, by Lester W. David, its president, addressed a letter attested by its treasurer to the Monarch Lumber Company of Oregon saying that the David Investment Company agreed to purchase the lumber company's twelve notes for $25,000 each, dated September 1, 1911, and would pay for the notes by giving $264,000 in cash

and crediting $36,000 on the indebtedness owing to the writer. At the bottom of this letter was written "Accepted Monarch Lumber Company of Oregon by Lester W. David its President."

Under date of September 19, 1911, the David Investment Company, by its president Lester W. David, addressed a letter to the Assets Realization Company reciting that the writer had undertaken to purchase from the Monarch Lumber Company of Oregon its twelve promissory notes and that it had agreed to pay cash and credits for the notes, and offering to sell the paper to the Assets Realization Company. The letter was accompanied by a copy of the letter which had been addressed to the Monarch Lumber Company of Oregon. A meeting of the board of directors of the Monarch Lumber Company of Oregon was held on September 9, 1911, and a resolution was passed authorizing the president and secretary to execute the twelve notes and mortgage. A meeting of the board of directors of the David Investment Company was held on September 19, 1911, and a resolution was adopted authorizing the president and treasurer of the company to execute upon the back of each of the twelve notes a guaranty of the indebtedness evidenced by the paper. Both letters signed by the David Investment Company as well as the resolution passed by the board of directors of the Monarch Lumber Company of Oregon and the resolution adopted by the board of directors of the David Investment Company were prepared by Jacob Levin, the attorney for the Assets Realization Company. The David Investment Company received a check from the Assets Realization Company on September 26, 1911, for the sum of $263,473.06, which was immediately deposited in a Chicago bank. At the request of Lester W. David, the

Chicago bank transmitted the amount by wire to a bank in Portland, Oregon, where the sum of $263,473.06 was deposited on September 27, 1911, to the credit of the Monarch Lumber Company of Oregon. On the same day, September 27, 1911, according to a certificate sworn to on September 29, 1911, by the accountant of the Monarch Lumber Company of Oregon, an entry was made upon the books of the Monarch Lumber Company of Oregon crediting the David Investment Company with $263,473.06 cash to apply upon the notes which had been charged to the David Investment Company, and the further sum of $36,526.94 was entered upon the books of the Monarch Lumber Company of Oregon to the account of the David Investment Company.

The charge made by Brayton & Lawbaugh, Ltd., in its complaint, that the Monarch Lumber Company of Oregon owed the Assets Realization Company only about $200,000 and that the notes and mortgage were given for the purpose of preferring the Assets Realization Company and to defraud other creditors, is disproved by the evidence. Neither Lester W. David nor the Monarch Lumber Company of Oregon nor the David Investment Company had ever dealt with the Assets Realization Company prior to the negotiations which resulted in the execution of the notes and mortgage. The Monarch Lumber Company of Oregon owed about a quarter of a million dollars and it was without means with which to operate its sawmill. As the owner of most of the stock of the lumber company the David Investment Company was necessarily interested in procuring money with which to pay the indebtedness of the Monarch Lumber Company of Oregon; and as the owner of most of the stock of the David Investment Company, Lester W. David was desirous

of securing funds for the Monarch Lumber Company of Oregon. The David Investment Company was a *bona fide* creditor of the Monarch Lumber Company of Oregon to the amount of about $57,000. Every dollar represented by the face of the notes was received by the Monarch Lumber Company of Oregon, because it received $263,473.06 in cash and was credited with $36,526.94 on its indebtedness to the David Investment Company. These notes and the mortgage were executed for the purpose of obtaining funds with which to pay creditors and not for the purpose of defrauding them. The money received on these notes was in fact used to pay the then existing indebtedness and so far as disclosed by the record every creditor was paid in full with the single exception of the David Investment Company. The indebtedness represented by the notes and mortgage is free from fraud, illegality or taint unless it can be said that they are infected with usury.

2. The notes and mortgage are assailed, particularly by Bjelik, on the ground that they are usurious. However, we do not deem it necessary in this suit to determine whether the Assets Realization Company was a usurer. The notes and mortgage either are or they are not usurious papers. If they are not usurious then the Assets Realization Company holds a prior lien on Tracts A and B because Bjelik, the plaintiff and Patton are subsequent judgment creditors. If on the other hand the notes and mortgage are usurious, nevertheless they are superior to the subsequent judgments for the reason that usury neither discharges the debtor from the payment of the debt nor releases the land from the lien of the mortgage.

The statute which prohibits usury also fixes the penalty to be imposed upon the usurer. Section 6030, L. O. L., reads thus:

"If it shall be ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money, property, or other valuable thing, or that any gift or donation of money, property, or other valuable thing has been made or promised to be made to a lender or creditor, or to any person for him, directly or indirectly, either by the borrower or debtor, or any person for him, the design of which is to obtain for money so loaned or for debts due, or to become due a rate of interest greater than that specified by the provisions of this chapter, the same shall be deemed usurious, and shall work a forfeiture of the entire debt so contracted to the school fund of the county where such suit is brought. The court in which such suit is prosecuted shall render judgment for the amount of the original sum loaned or the debt contracted, without interest, against the defendant and in favor of the state of Oregon, for the use of the common school fund of said county, and against the plaintiff for costs of suit, whether such suit be contested or not."

It will be observed that the statute does not cancel the debt. The debtor is not relieved from liability to pay, although the amount which he may be obliged to pay is reduced to the original sum loaned without interest. The debtor is compelled to pay by force of a judgment against him and in favor of the State of Oregon for the use of the common school fund of the county. The very circumstance that a judgment is provided for of itself necessarily implies that the debt is not canceled. The mortgage secures and is incident to the debt and consequently when the debt is forfeited to the state the forfeiture carries the mortgage with the debt: *Chapman* v. *State,* 5 Or. 432, 436. No payments have been made on any of the notes except interest to September, 1912, and hence the maker of the notes is still a debtor. If the con-

tracts are not usurious, the lien of the mortgage gives the holder of the notes the right to be paid $300,000 with interest from September, 1912, before payment of the subsequent judgments; and even though the notes are tainted with usury the mortgage nevertheless gives the amount secured by it priority over the subsequent judgments. The debtor cannot be freed from liability; nor can the mortgage be canceled so as to reduce the notes to the rank of unsecured claims; and hence for the purposes of this suit it is immaterial whether the notes are or are not usurious and for that reason we do not attempt to determine whether the statute against usury has been violated.

3. The object of this suit is to annul the deeds and bills of sale conveying the assets of the Monarch Lumber Company of Oregon and to defeat or to reduce the amount and rank of the notes and mortgage. Neither the Assets Realization Company of Oregon nor Crawford seeks a foreclosure of the mortgage. The holder of the notes, the trustee and the lumber companies merely ask for a dismissal of the suit. This is not such a suit as is contemplated by Section 6030, L. O. L., and since that section of the Code is the measure of the power of the court a judgment could not be entered in this suit in favor of the state even though it be assumed that the notes are tainted with usury: See *Sujette* v. *Wilson,* 13 Or. 514, 521 (11 Pac. 267); *Holladay* v. *Holladay,* 13 Or. 523, 530 (11 Pac. 260, 12 Pac. 821). Nor do the judgment creditors contend that a judgment on the notes can be entered in this suit, although they do insist that the contracts are usurious. However, we do not now express or intimate any opinion concerning the quality of the notes. The character of the paper can be ascertained

whenever a suit described by Section 6030, L. O. L., is brought by some party.

4. The plaintiff avers that the deeds and bill of sale to the Monarch Lumber Company of Maine were executed pursuant to a conspiracy to prefer the Assets Realization Company and to defraud the other creditors. This accusation makes it necessary to relate the story of the deeds and bill of sale. The conveyances were the fruits of a plan for the reorganization of the affairs of the Monarch Lumber Company of Oregon; and while the plan itself was conceived in honesty it may possibly be true that its execution was corrupted by questionable motives. When the Monarch Lumber Company of Oregon received $263,473.06 in cash on September 27, 1911, it paid all its creditors, except the David Investment Company, and resumed the operation of its sawmill. The mill was run until February, 1913, when it was closed down on account of the financial condition of the company. A large floating indebtedness had again been incurred and the Lumber Company found itself owing approximately $200,000 besides the indebtedness on the notes. Interest had not been paid on the notes since September, 1912, and the principal was overdue. The Assets Realization Company was pressing the Monarch Lumber Company of Oregon for the payment of the notes and was threatening foreclosure. Funds were needed to pay premiums on insurance and taxes were unpaid. In this situation a reorganization plan was devised. The Monarch Lumber Company of Maine had been organized in 1912 and the amount of its capital stock placed at $6,000,000. Even as early as 1912 the Monarch Lumber Company of Oregon was known to be drifting towards financial troubles. At that time Lester W. David and another person had an op-

tion on a large body of timber. David planned the organization of the Maine company with the purpose of transferring the option on the timber to the Monarch Lumber Company of Maine so that it could issue bonds on the faith of the property conveyed to it and use the proceeds to pay for the timber lands and also to pay the creditors of the Monarch Lumber Company of Oregon. This plan was never consummated; the option was not transferred; stock in the Maine company was not issued; and no bonds were sold. However, the Maine corporation was still available in 1913 when a second organization plan was conceived. The second plan contemplated that all the assets of the Monarch Lumber Company of Oregon would be transferred, subject to the $300,000 mortgage, to the Monarch Lumber Company of Maine for shares of stock to be issued by the Maine company in payment for the assets received by it, and that the stock so issued would then be sold and the proceeds used to pay the creditors of the Monarch Lumber Company of Oregon. The stockholders of the Oregon company held a meeting on March 26, 1913, and authorized the transfer of its assets for $750,000 of preferred stock to the Maine company. On the same day the board of directors of the Oregon company authorized its president to enter into an agreement which was afterwards made with the creditors of the company. This agreement is dated April 1, 1913, and is signed by creditors holding claims which aggregate $190,187.57. By the terms of the agreement the creditors consent to a transfer of the assets of the Oregon company to the Maine company upon condition that the $750,000 of preferred stock to be issued by the Maine company to the Oregon company is by the latter company indorsed in blank and

deposited with a trustee named by the creditors with the understanding that Lester W. David would on or before August 1, 1913, sell "enough of such stock deposited with said trustee to pay in full the claims" of the creditors. It may be added in passing, however, that neither the plaintiff nor Bjelik nor Patton signed this agreement. The board of directors of the Monarch Lumber Company of Maine held a meeting on June 24, 1913, and formally accepted the offer of the Oregon company to convey its assets for $750,000 of the preferred stock of the Maine company, the stock to be delivered to the nominee of the Oregon company. The Monarch Lumber Company of Oregon conveyed all its property by executing the two deeds and bill of sale to the Monarch Lumber Company of Maine and the latter company issued $750,000 of its preferred stock and delivered it to a committee named by the creditors. The Maine company never at any time owned any property except the property received by it from the Oregon company. None of the stock turned over to the creditors committee was ever sold. The Assets Realization Company had been insisting upon the payment of the notes. On July 30, 1913, the very day when the deed to the Oregon Slough property and the bill of sale were executed by the Oregon company, the board of directors of the Monarch Lumber Company of Maine held a meeting and adopted a resolution authorizing the conveyance by warranty deed of all the mortgaged property to Ira M. Cobe "in full payment, release and discharge" of the notes and mortgage. The Assets Realization Company asserts that it refused to accept a conveyance of the property as payment of the indebtedness and it claims that the deed and bill of sale to Cobe dated September 4, 1913, and recorded September 6, 1913,

the day upon which the deed made by the Oregon company conveying the Kenton property was recorded, were made and received as further security for the notes held by it and to enable it to dispose of the personal property. Although we do not find it necessary to decide whether the conveyances to Cobe constituted an attempt to discharge the indebtedness and to transfer title to him for the benefit of the Assets Realization Company, we do, however, call attention to the fact that there is evidence in the record about an agreement to reconvey to the Maine company for $332,000, interest and expenses; and it will be noticed that this sum exceeds the amount that would be due by the terms of the notes. None of the stock delivered to the creditors committee was ever sold. No attempt was made by Lester W. David to sell any of the stock; and, indeed, any attempt to sell stock would have been futile because when the Maine company deeded to Cobe it was, so far as shown by the records, left without any assets. It is conceded that no consideration was paid to the Maine company for the deed and bill of sale delivered by that company. The consideration for the deeds and bill of sale executed by the Oregon company failed completely. The Assets Realization Company had knowledge of the circumstances and purpose of the conveyances to the Maine company. The deed and bill of sale to Cobe were made not only without authorization but also in direct violation of the only resolution that had been adopted by the Maine company. The Assets Realization Company does not assert ownership by virtue of the instruments made by the Maine company. Moreover, in their brief the appellants, when referring to the deeds from the Oregon company and the one from the Maine company, expressly admit that "all parties concede that they are

not valid" as deeds. Neither the Monarch Lumber Company of Oregon nor its creditors consented to the transfers to Cobe. The conveyances to the Maine company, to Cobe, and to Murphy were properly annulled by the decree appealed from.

5. The final question for consideration arises out of the appointment of a receiver. The Assets Realization Company argues that either the mortgagee or its alienee was in possession of the property when the receiver was appointed and that the court could not oust the mortgagee or its alienee by the process of appointing a receiver. The Assets Realization Company through its trustee Cobe took charge of all the property immediately upon the delivery of the deed and bill of sale recorded on September 6, 1913. Cobe and his successor Murphy rented some of the property and from time to time sold lumber and other personalty and used the proceeds to pay the expenses incurred in caring for the property. The third amended complaint was filed in this suit in November, 1915, and the decree of the Circuit Court was not rendered until May 2, 1917. Bjelik filed a motion on January 3, 1917, and Patton presented a motion on January 17, 1917, asking for the appointment of a receiver. The motions were supported by affidavits and the court appointed a receiver on January 23, 1917. Among the findings made by the trial court and upon which the final decree was rendered are the following:

"This court now finds it to be true that after the trial and submission of this cause, and while the same was under consideration by this court, the defendants Cobe, Murphy and Assets Realization Company by an instrument in writing executed and entered into by and between said parties and said Lester W. David, sold and transferred all their right, title and interest in and to all of said property, unto said David, at the

agreed purchase price of $180,000, of which amount the sum of $5,000 was in full payment for said personal property, and the balance $175,000, was in full payment of the purchase price of said real property, to be paid as follows: $30,000 in cash upon execution of said instrument, and $25,000 yearly thereafter on August 1, 1917, to 1920, inclusive, and $50,000 on August 1, 1921, with interest on deferred payments at 6 per cent. And as an incident to said sale of said property said Assets Realization Co., agreed to have defendant Crawford, its trustee, release said mortgage, or to assign, transfer or set over said trust deed, and the notes secured thereby, to said David at his option; and further therein agreed to and did turn over and deliver possession of all of said property to said David, as the purchaser thereof. That prior thereto said David had caused the Monarch Mills, a corporation, to be organized under the laws of the State of Oregon, with a capital stock of $750,000 for the sole and exclusive purpose of selling and transferring to said corporation all of his right, title and interest, and his possession in and to all of said property under his said contract of purchase, as herein found; all of which was done. That said David was and is the vice-president of said Monarch Mills, a corporation, and owns $440,000 of its capital stock, and is its controlling and dominating factor.

"The court further finds that thereupon said Monarch Mills entered into possession of said property, claiming to be the owner thereof, and thereafter exercised acts of ownership therein, and did thereafter operate said electric power plant situate on said property, and did lease the two mills thereon situate to various parties, and did erect and make certain improvements thereon.

"*The court finds that the Assets Realization Co. was not in possession of said property as mortgagee:* that said Crawford was not in possession of said property as trustee under said instrument, and that neither said Cobe nor Murphy were in possession of said property as agents of said mortgagee or trustee, *but that at said*

time said Monarch Mills, a corporation, was in possession thereof, as the reputed and assumed owner of said property under its said contract of purchase."

If it be assumed, however, for the purpose of this case that the mortgagee was rightfully in possession when the court appointed a receiver or if it be assumed that the deed and bill of sale to Cobe rightfully transferred possession to the mortgagee and that the subsequent possession of the Monarch Mills was the possession of the alienee of the mortgagee, nevertheless the appointment of a receiver was warranted. It may be conceded that the general rule is that a mortgagee rightfully in possession of mortgaged property cannot be ousted by the appointment of a receiver at the instance of the mortgagor or one claiming under the mortgagor without first paying or tendering the amount due on the mortgage debt; but this rule like most general rules has its exceptions. If the mortgagee is committing waste and is insolvent, equitable relief may be necessary: *Brundage* v. *Home Sav. & Loan Assn.*, 11 Wash. 277 (39 Pac. 666); *Bolles* v. *Duff*, 35 How. Pr. (N. Y.) 481.

Attached to the bill of sale signed by the Monarch Lumber Company of Oregon on July 30, 1913, is an inventory showing the value of its assets. The total assets are appraised in the inventory at $1,078,063.50; the property accounts are fixed at $778,593.96 and the buildings and machinery are listed at $755,835.15. Under date of February 1, 1912, the Assets Realization Company prepared and sent to its customers, to induce them to purchase the notes acquired in September, 1911, a circular which among other things declares that the financial statement of the Oregon Company "as of November 1, 1911" shows the mill-site, sawmill, plants complete and equipment and the

Kenton property to be worth $815,396.63; and that "our timber expert states that the sawmill property, equipment and real estate are worth $375,000 at quick sale and that the entire property of the company could be disposed of within 60 days for $500,000." At the trial in June, 1916, Lester W. David testified that in his opinion the mill property was not reasonably worth more than $175,000 at that time. The Monarch Lumber Company of Oregon is hopelessly insolvent; the Monarch Lumber Company of Maine has no property and exists in name only; prior to June, 1916, the Assets Realization Company had met with financial reverses, its Chicago office was closed, and its affairs were placed in the hands of a creditors committee; Lester W. David "had to go through bankruptcy"; it is a fair inference to say that the plight of the David Investment Company was neither better than its owner, Lester W. David, nor than the concern owned by it, the Monarch Lumber Company of Oregon. If the Monarch Mills is to be considered as an alienee of the mortgagee and that it was rightfully in possession of the property, then it is plain, from the record presented on this appeal, that it does not measure up to the financial standard which is necessary to enable it to retain possession.

In brief, the properties shrunk from $778,593.96, their appraised value when the Assets Realization Company entered into possession on September 6, 1913, to $175,000 when the receiver was appointed; the Assets Realization Company had had possession of the property for more than three years and notwithstanding the fact that the monthly expense incurred in caring for the property exceeded the receipts from sales and rentals no attempt was made to foreclose the notes and mortgage; in the language of Jacob Levin

the Assets Realization Company "failed"; the mortgaged property was rapidly diminishing in substance and in value to the detriment of both the mortgagee and the judgment creditors. The facts warranted the appointment of a receiver. However, the appointment of the receiver should in no wise interfere with the foreclosure of the notes and mortgage; and whenever the holder of the notes desires to sue permission to do so should be promptly granted and the quality and amount of the indebtedness can then be determined, the mortgaged property sold and the proceeds of sale distributed. The conclusions herein expressed lead to an affirmation of the decree.

Affirmed. Rehearing Denied.

Mr. Chief Justice McBride, Mr. Justice Benson and Mr. Justice Burnett concur.

Denied February 13, 1918.

Petition for Rehearing.

(170 Pac. 717.)

On petition for rehearing. Denied.

Messrs. Teal, Minor & Winfree and *Messrs. Wilson, Neal & Rossman,* for the petition.

Mr. Hugh Montgomery, Messrs. Platt & Platt, Mr. J. W. Kaste and *Mr. Maurice W. Seitz, contra.*

Mr. Justice Harris, delivered the opinion of the court.

The appellants have filed a petition in which they present at some length their contention that error was

committed in approving the appointment of a receiver. The petition presents no new argument; and, therefore, it is not necessary to restate the evidence or the contention of the parties. It is enough to say that, realizing the importance of the litigation, we have again examined the evidence and come to the same conclusion that was reached in the original opinion. The petition for a rehearing is denied.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON, and MR. JUSTICE BURNETT concur.

Argued February 5, affirmed February 13, 1918.

DIECKMAN *v.* JAEGER.*

(170 Pac. 727.)

Deeds—Delivery.

1. If the grantor parts with all dominion and control over his deed, reserving no right to recall it or alter its provisions, there is a good delivery.

Deeds—Delivery—Direction to Turn Over to Grantee "In Case of My Death."

2. Where the grantor deposited his deed to the grantee with third persons, directing, "In case of my death you will please deliver the attached deed, from myself to E. D., to E. D.," there was a good delivery, and the grantee on the grantor's death succeeded to so much of the land as the grantor had not conveyed to others, since the words "in case of my death" as used are identical with "after my death."

Deeds—Delivery—Delivery to Third Person.

3. A delivery of a deed to a third person for the grantee is absolute, unless the grantor at the time of making it manifested some intention of retaining control, or there are circumstances showing that the deposit was made subject to recall.

[As to admissibility of evidence to show that instrument not testamentary on its face was intended to take effect upon the death of the maker, see note in Ann. Cas. 1914A, 89.]

*On delivery of deed to third person or record by grantor, as a delivery to the grantee, see notes in 54 L. R. A. 865; 9 L. R. A. (N. S.) 224; 38 L. R. A. (N. S.) 941. REPORTER.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is an action of ejectment. In October, 1909, Henry Carl Dieckman executed a deed conveying to Emilie Dieckman a tract of 160 acres of land in Clackamas County, Oregon, and on December 10th of the same year deposited it with J. W. Thornton & Son with the following note:

"December 10, 1909.

"J. W. Thornton & Son,
"Wilsonville, Or.

"Gentlemen:

"In case of my death you will please deliver the attached deed, from myself to Emilie Dieckman, to Emilie Dieckman, deed conveying 160 acres of sections thirteen and fourteen in township three, south of range one west, Clackamas County, Oregon, dated March 27th, 1909.

"(Signed) HENRY KARL DIECKMAN."

Thereafter he conveyed to other parties a portion of said land, but not the forty acres involved in this action. Henry Carl Dieckman died on the twenty-eighth day of March, 1912, and the plaintiff and two other sisters are his heirs at law. The defendant, Gust Jaeger, was appointed administrator of Dieckman's estate and took possession of the property in dispute as the property of deceased, whereupon the plaintiff brought this action. There were findings and a judgment for plaintiff, and defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Dimick & Dimick* and *Mr. W. L. Mulvey,* with an oral argument by *Mr. Grant B. Dimick.*

For respondent there was a brief over the names of *Mr. Martin L. Pipes, Mr. John M. Pipes* and *Mr. George A. Pipes,* with an oral argument by *Mr. Martin L. Pipes.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

This appeal presents the single question, namely: whether the findings of the Circuit Court are sufficient to sustain the judgment, and this again narrows down to a construction of the written instructions which accompanied the deposit of the deed with Thornton & Son. The evidence upon which the Circuit Court based its decision cannot be considered here and we must assume that it was sufficient to justify the findings. These are to the effect that Dieckman executed the deed, deposited it with Thornton & Son without any other or different instruction than these recited in the writing above quoted; and that he subsequently conveyed a portion of the property to other persons.

1. It is settled in this jurisdiction that

"if the grantor parts with all dominion and control over the deed, reserving no right to recall it or alter its provisions, it is a good delivery and the grantee will, upon the death of the grantor, succeed to the title": *Hoffmire* v. *Martin,* 29 Or. 240 (45 Pac. 754).

In that case the declaration of the grantor at the time of the delivery of the deed to the depositary was as follows: "I want you to take this and after I am gone I want you to have it recorded and turn over to the boy," meaning the grantee. This court said:

"It is clear that the delivery of the deed was absolute and unconditional, the grantor never having possession of it thereafter and we think it manifest from his declaration at the time as well as from all the surrounding circumstances that he intended by such delivery to divest himself of all power and domin-

ion over the deed and that it was no longer subject to his control."

2, 3. Counsel for appellant attempts to distinguish between the language used by the grantor in the Hoffmire case and that employed by the grantor here. In the case cited the grantor directed that the deed be delivered "after my death," and in the case at bar the direction was to deliver it "in case of my death." As here used we think the expressions are practically identical. The phrase "in case of my death" as here used is vitally different from the phrase "in case of death" so often used with reference to beneficiaries in wills and similar documents. As where a devise contains the words "I give to A my property and in case of his death the same to go to B." In such cases it has been held in the absence of special circumstances indicating a contrary intention, that the true purpose of the phrase was not to create a remainder in B upon the death of A, but that if A were living at the time of the testator's death he took the estate absolutely, the phrase quoted being construed as merely having reference to the contingency that A might die before the testator, and the devise thereby lapse: *Skipwith* v. *Cabell's Exr.*, 19 Gratt. (Va.) 758; *Hill's Lessee* v. *Hill*, 5 Gill & J. (Md.) 87; *Hinkly* v. *Simmons*, 4 Ves. 160; *Wright* v. *Stephens*, 4 Barn. & Ald. 674. This rule is predicated upon the possibility that the beneficiary may die before the devisor and the legacy thereby lapse, but in case of a deed there would be no failure of the grant by reason of the death of the grantee, while the death of the grantor at some period being an absolute certainty the deposit cannot be said to depend upon the possible or probable happening of an uncertain event. The legal meaning therefore

of the words "in case of my death" must logically be held to be "after my death" and it is so held.

In 2 Jarman on Wills, 760, it is said:

"Consistently with the principle of the two cases (*Smart* v. *Clark,* 3 Russ. 365, *Tilson* v. *Jones,* 1 Russ. & M. 553) just stated, it has been held that the words under consideration 'in case of his death' succeeding an indefinite devise of land, would (as such a devise, if contained in a will which is subject to the old law, confers only an estate for life) be held to be synonymous with 'after the death' and accordingly the estate to which they are prefixed is a vested remainder expectant on such life-estate. Thus, in *Bowen* v. *Scowcroft,* 2 You. & Coll. 640, where an undivided share in lands was devised to W. and B., and in case of their demise the testator devised their respective shares to be equally divided among their children or their lawful heirs, ALDERSON, B., was of the opinion that, as this was a case of a devise of land, the authorities relating to personal estate did not apply, and that the words were to be construed 'after their decease.'"

As before remarked, we have not the aid of any extrinsic testimony to indicate an intention upon the part of the testator to retain control of the deed when he deposited it with Thornton & Son. The rule in this state, differing from that announced in some other jurisdictions, holds such a delivery to be absolute unless the grantor at the time of making it manifests some intention of retaining such control, or there are in the circumstances attending the deposit some evidence that it was made subject to recall by the grantor. *Foote* v. *Lichty,* 60 Or. 542 (120 Pac. 398), is an instructive case, wherein the grantor sought in his lifetime to recall deeds executed and placed in the hands of a custodian to be recorded at grantor's death. Foote testified that it was not his intention to part with the control of the deeds, but admitted that he said nothing

to the custodian about taking them back. The delivery, as here, was upon the face of it absolute and this court, speaking through Mr. Justice BURNETT, said:

"The rule is well established in this state that such conduct is proof of the present intent of the grantor to then convey the land to the grantee. The weight of authority seems to be that, if the grantor would have a different effect given to his acts, he must at the time of putting the deeds in the possession of a stranger append thereto the condition affirmatively that on the demand of the grantor they should be returned to him. If nothing is said on the subject, the transaction will take the natural course of a conveyance."

To reverse this case would be to overturn the fixed and consistent holding of this court in numerous cases, as well as what we deem to be the weight of authority in other jurisdictions, and as the rule heretofore adopted by us seems in the majority of instances to have accomplished substantial justice we see no good reason to depart from it and the judgment is therefore affirmed. AFFIRMED.

MR. JUSTICE MOORE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Argued December 5, modified December 27, 1917, rehearing denied January 29, supplemental petition for rehearing denied February 19, 1918.

OREGON-WASH. R. & N. CO. *v.* REED.*

(169 Pac. 342; 170 Pac. 300.)

Abatement and Revival—Denial of Plea in Abatement—Pendency of Prior Suit—"Pending."

1. Suit against husband and wife, commenced against the husband alone July 17th, amended complaint making the wife a party defendant being filed July 31st, was "pending" when the wife's suit against plaintiff was instituted July 28th, so that denial of defendants' plea in abatement on the ground that a prior suit instituted by the wife against plaintiff was pending was proper.

Attorney and Client—Admissions—Effect.

2. In suit by a railroad against land owners, where the land owners claimed they did not understand the effect of a deed of theirs to the road, but their previous attorney, who acted for them in the transaction, testified unequivocally that they did understand its effect, and their present attorney in court stated that he could not contradict such previous attorney's testimony, and would have to abide by it, the announcement, approved by the court, forever settled the question that the land owners' deed was knowingly executed by them as a substitute for and in lieu of their previous conveyance to the railway.

Railroads—Right of Way—Covenant Running With Land—Basis in Inference.

3. In the absence of any evidence in relation to whether rights of the grantor of land to a railway to have two wagon road crossings maintained ran with the land, or were anything more than personal covenants, the reference, in the reservation of his deed, to a county road, might create an inference that the designated highway was *in esse*, a part of the land, so that the railway was required to perform the terms of its agreement in favor of the grantor's assigns without express words to that effect.

Railroads—Right of Way—Land Owners' Right to Cross.

4. In suit by a railway against land owners to enjoin interference with its right of way and to quiet title, the trial court properly restricted the right of the land owners to the private crossing of the track to be made and maintained by them at the place designated by them in their latest conveyance to the railway's predecessor, where no right to cross any part of the premises elsewhere could possibly be found in their favor by the most liberal construction of the two grants, when read together.

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*On the question of right to injunction against repeated trespass, see notes in 13 **L. R. A. (N. S.)** 173; 21 **L. R. A. (N. S.)** 417.

As to when action is deemed commenced for the purpose of abating subsequent action, see note in 52 **L. R. A. (N. S.)** 79. REPORTER.

Equity—Damages.

5. The right to recover damages in a suit or cross-suit in equity must depend on some equity which enables the court to secure and retain jurisdiction of the subject matter, and, as an incident, to award the damages inflicted.

Equity—Finding No Equity Exists—Trial to Ascertain Legal Right.

6. Where it is found at hearing of a cause that the equity on which it was predicated does not exist, the suit is terminated, and cannot be tried to ascertain any legal right existing between the parties.

PETITION FOR REHEARING.

Equity—Jurisdiction.

7. When a court of equity obtains jurisdiction of a cause for a particular purpose, it will retain and exercise jurisdiction to determine all necessary incidents, though they may involve purely legal matters as a part of the relief.

Injunction—Trespass—Permanent Injury.

8. A continuing trespass committed upon real property, tending to a removal of earth or of any substance therein or permanently attached thereto, will usually be enjoined in a suit instituted for that purpose by the party sustaining the injury.

Injunction—Trespass—Legal Remedy.

9. When the recurrence of injury by trespass is not reasonably to be apprehended, the remedy at law for recovery of damages is usually regarded as adequate, and relief by injunction will usually be denied.

Trespass—What Constitutes—Cutting Timber.

10. It is not a trespass for a railroad to whom a right of way is granted to cut shrubs along the right of way, with permission of the abutting owners.

Trespass—Damages—Measure.

11. Where railroad cut brush along right of way and left it upon the abutting owner's land, her remedy was the expense reasonably to be incurred in removing it, and not the damages which might result from inability to use the land for agricultural purposes.

Injunction—Trespass—Damage.

12. Where railroad cut brush along right of way and left it on adjoining land, an action at law to recover the expense reasonably to be incurred in removing the brush affords an adequate remedy, and no exigency exists for resorting to the court of equity.

Injunction—Continuing Injury—Diversion of Water.

13. Where a railroad in changing its roadbed diverted the water of a brook so that it seeped through the embankment and damaged adjoining land, such acts constituted a continuing trespass.

Injunction—Laches—Trespass.

14. Where the owner of land adjoining a railroad for seven years after the railroad diverted a stream so as to cause seepage on the

land asserted no rights and sought no relief, her long delay precluded equitable intervention.

Equity—Objections to Jurisdiction—Time.

15. Where a railroad sued to enjoin interference with its right of way by adjoining owners, and they filed a separate suit in equity to reform their deed to the railroad of the right of way and to enjoin trespass, to which demurrer was overruled, and the railroad filed an answer denying the averments of the complaint and setting forth as a defense the averments of its complaint in the original suit, the rule that objection to jurisdiction in equity comes too late after defendant in answer asks for affirmative relief did not apply.

Equity—Legal Relief—Denial of Equitable Relief—Right.

16. Where a railroad sued to enjoin interference with its right of way by adjoining owners, and they filed a separate suit in equity to reform their deed to the railroad of the right of way and to enjoin trespass, to which demurrer was overruled, and the railroad filed an answer denying the averments of the complaint and setting forth as a defense the averments of its complaint in the original suit, when the land owner's bill was found to be without equity, her claim for damages could not be adjudicated.

[As to right to affirmative relief on cross-bill in suit to quiet title, see note in **Ann. Cas.** 1917D, 674.]

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This suit was commenced July 17, 1915, by the Oregon-Washington Railroad & Navigation Company, a corporation, against Frank H. Reed to enjoin interference with a railway right of way and to quiet the title thereto. The defendant on the 28th of that month filed an answer alleging *inter alia* that his wife, Minnie T. Reed, was the owner in fee of the real property over and across which extended that part of the right of way involved. Three days thereafter the plaintiff, by leave of court, filed an amended complaint making Mrs. Reed a party defendant. The defendants on August 3, 1915, interposed a plea in abatement, on the ground that another suit was pending between Mrs. Reed and the Railway Company, involving the same subject matter. Joined with the plea in abatement was an answer to the merits, and also a cross-bill in equity

by Mrs. Reed to enjoin the plaintiff, its agents, etc., from interfering with or trespassing upon her land, to recover $3,000 as damages to her real property, and to reform a deed executed by her and her husband to the plaintiff's predecessor in interest. Answers and replies put in issue all the material averments of the pleadings of the respective parties. At the trial of the cause the court, in order to be advised, called a jury who inspected the premises and after hearing the evidence, made written replies to questions submitted to them as follows:

"First, what damage, if any, has the water as changed by the railroad company, done to Mrs. Reed's land?

"Answer. None.

"Second, was that damage caused by the construction of the railroad on the revised line, which construction includes the method of handling the drainage?

"(A.) No damage.

"Third: Did the railroad company excavate from the toe of the slope on the south side of the track at the west portal to tunnel number 1, more yardage than was reasonably necessary to maintain the safety and efficiency of the railroad?

"(A.) No.

"Fourth: If the third question is answered in the affirmative, in what sum do you assess the damage?

"(A.) No damage."

From these special verdicts and from the evidence received the court made findings of fact and of law and based thereon decreed that the plaintiff was the owner and entitled to the possession of a strip of land conveyed to its predecessor in interest May 28, 1881, by Frederick Willer, the predecessor in title of the defendants; that the plaintiff was also such owner and entitled to the possession of a strip of land conveyed

to its predecessor in interest by the defendants April 2, 1907, particularly describing each strip, and perpetually enjoined the defendants, their agents, etc., from interfering in any manner with or trespassing upon the real property so conveyed, awarding them the right, however, to construct and maintain a private road or trail over an acre of land particularly described, and also authorizing them to maintain a private crossing with gates over the railway near the west end of the tunnel, but not so to exercise the latter right as actually, imminently or potentially to injure the plaintiff's property. From this decree the defendants appeal. MODIFIED.

For appellants there was a brief and an oral argument by *Mr. Ralph R. Duniway.*

For respondent there was a brief over the names of *Mr. Arthur C. Spencer, Mr. William W. Cotton, Mr. W. A. Robbins* and *Mr. Charles E. Cochran,* with an oral argument by *Mr. Spencer.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended by defendants' counsel that an error was committed in denying their plea in abatement, interposed on the ground that a prior suit, instituted by Mrs. Reed against the plaintiff herein, was pending. It will be remembered that this suit was commenced against Mr. Reed July 17, 1915, and that on the 31st of that month an amended complaint was filed making Mrs. Reed a party defendant. She instituted a suit against the Railroad Company as defendant July 28, 1915, or eleven days after this suit was begun, and as

this is the prior suit and was pending when her suit was commenced, no error was committed as alleged.

It appears from a transcript of the evidence that Mrs. Reed is the owner in fee of lots 1 and 2, section 26, T. 1 N., R. 4 E., in Multnomah County, Oregon. Her predecessor in title, Frederick Willer, in consideration of $70 executed on May 28, 1881, to the Oregon Railway & Navigation Company, one of the plaintiff's predecessors in interest, a deed conveying a strip of land 100 feet in width, being 50 feet in width on each side of and parallel with the center line of the grantee's railroad, as the same was staked out and located over and across such lots. That deed contains a clause which reads:

"Provided, that said railway company agrees to provide and maintain two wagon road crossings for the use of said Willer, one of which is to be the county road, and to permit said Willer to construct a wood chute under said track and to leave an opening therefor."

The lots so described border for a distance of 160 rods upon the Columbia River, along the left bank of which the railway was originally constructed as surveyed. A mound on this real property, generally known as "Table Rock" extends into the river, the cape of the hill being nearly in line with the division between these lots. A tunnel 614 feet in length was cut through the rocky point at an expense of more than $75,000. From a blue-print received in evidence it is disclosed that the right of way conveyed by Willer was surveyed as a tangent extending northeasterly from the west boundary of lot No. 2, about 600 feet; thence the line slightly curved southerly a short distance; thence the survey sharply curved northerly to about

half way through the tunnel, and thence by a tangent southeasterly to the east boundary of lot No. 1.

The plaintiff's predecessor in interest, desiring to reduce the curvature of its railway, which had been constructed and was operated on the line, as originally laid out, caused another survey to be made across these lots, and on July 11, 1906, in consideration of $500, secured from Mrs. Reed and her husband, who had succeeded to the estate of Willer in the premises, a deed conveying

"A strip of land 100 feet wide, being 50 feet in width on each side of and parallel with the revised center line of the main track of the Oregon Railroad & Navigation Company's railroad, as the same is staked out and located over and across the lands of the said grantors,"

particularly describing the lots. This deed contains the following clause:

"This instrument is intended as a deed of right of way for the construction of the railroad on said revised line, and is conditioned that upon the change of the railroad from the present to the above location, all that part of the original right of way not included in the above granted strip shall revert to and become the property of the grantors. The grantee will construct and maintain for the use of the grantors a private crossing at grade with gates."

It further appears from the blue-print mentioned, that the north boundary of the right of way last conveyed, begins at a point on the west line of lot No. 2, about 30 feet north of the right so granted by Willer, and extends by a long curve to the east line of Lot No. 1, at a point about 70 feet north of the right of way originally conveyed. About midway of the excavation of the tunnel mentioned, the north boundary of the new right of way coincides for about 200 feet

with the south boundary of Willer's grant. After the second deed was executed, the plaintiff's predecessor in interest began work on the revised line, by starting another tunnel 655 feet in length, the west entrance of which was about 90 feet south of the old tunnel, while the east end of the new cut was only about 30 feet south of the old subterranean passage. While cutting the new tunnel, earth on the south side of and beyond the line of the revised right of way, kept falling at the west end of the excavation, whereupon the defendants asserted claims for damages to and trespasses upon their lands, and in order amicably to adjust the matter, and to procure more land the plaintiff's predecessor in interest, upon the payment of $1,000 to Mrs. and Mr. Reed secured from them, on April 2, 1907, another deed reconveying the revised right of way as set forth in their deed of July 11, 1906, and also granting about an acre of land on the south side of the revised right of way at the west end of the tunnel where the slides had occurred, particularly describing such premises. Material clauses in the latter conveyance read:

"This deed is in lieu of and a substitute for a deed of bargain and sale made by the grantors herein to the grantee herein, dated July 11, 1906, and recorded at page 328 of Book 362 of the Records of Deeds of Multnomah County, Oregon. The grantee herein shall not excavate more earth from said premises hereby granted (about an acre where the slides had occurred) than is necessary for the proper and safe protection of its railroad. The consideration herein is in full satisfaction for any and all damages that may in any manner result to the adjacent lands of the grantors by virtue of the construction of said railroad on the grantee's revised line through said premises. All crossings and other privileges set forth in the deed of July 11th, above referred to, are hereby waived and held to be null and void, but grantors, their heirs and

assigns, or any of them, may construct and maintain one private road or trail over the land secondarily described herein, (the acre mentioned) and maintain thereat a private crossing with gates over grantee's railroad at the west end of the tunnel on said premises. Together with all and singular the trees, wood and timber thereon, and the stone, gravel and material therein, but the trees on top of the tunnels shall not be unnecessarily cut or removed by the grantee herein."

Pursuant to the last conveyance so made, the grantee therein named completed the revised line of railway, cut the new tunnel at an expense of more than $100,000 and moved the ties and rails from the old track to the new, finishing the work about September, 1908, when trains were then and thereafter operated through the new tunnel. The plaintiff herein on December 23, 1910, by mesne conveyances, secured a transfer of all the right, title, interest and estate in and to the premises so granted by Willer and the defendants to its predecessors, the Oregon Railway & Navigation Company and the Oregon Railroad & Navigation Company. Thereafter the defendants, asserting that under their deed of July 11, 1906, they were entitled to the old tunnel, took possession thereof without permission of the Railway Company, built at the west end of the new tunnel a retaining wall of logs, earth and brush, and their tenant removed from the old tunnel many of the timbers and supports therein. This suit was thereupon commenced and terminated as hereinbefore set forth.

At the trial Mrs. Reed as a witness in her own behalf testified that having secured the services of an attorney to protect her interests in the matter, she relied upon his advice and, with her husband, executed the conveyance April 2, 1907, without carefully examining the deed or knowing that it purported to

deprive her of the rights which were reserved by her conveyance of July 11, 1906. Mrs. Reed sought by such testimony and that of her witnesses a reformation of the latter deed so as to make it conform with the terms of an alleged oral contract, pursuant to which it was claimed the deed was made, so as to convey only the small tract of land at the west end of the new tunnel, and to have restored to her the rights of crossing the railway track as specified in the Willer deed. Mrs. Reed called as her witness George W. Joseph, who as her attorney secured the settlement with the Railway Company, pursuant to which she received $1,000 for executing the deed of April 2, 1907. This witness testified that he received from the Railway Company a writing prepared as a deed to be executed by Mrs. Reed; that he examined the instrument so submitted and suggested some alterations which were adopted and incorporated in another document that was sent to him; that Mrs. Reed and her husband were in his office at Portland, Oregon, when the latter writing was received and examined by him and them, in referring to which instrument the witness stated upon oath: "This deed was understood to be exactly what it purports to be, and it was so understood by all the parties interested." In alluding to the settlement which was secured, Mr. Joseph further testified:

"You see, the Reeds were getting $1,000 for a slope, you understand, that came down there [referring to the acre at the west end of the new tunnel]. Of course, it took this trail or road, which they talk about, (passing over the one acre) but so far as the commercial value of what the O. R. and N. (plaintiff's predecessor) got there, you understand, it was worth very little, and a $1,000 was an immense price to be paid for it, and that is the truth, and I told the Reeds so at that time and advised settlement, of course. I

think the railroad company offered a small amount; they offered something like $100 at first, and when we could get $1,000 there was no hesitancy on my part. We held and squeezed until we got the $1,000 and they were at work there and they had to have this right of way, and that is the way we got it."

In adverting to the final adjustment of the matter which was consummated by the deed of April 2, 1907, the witness further testified:

"But at this time we were settling differences that had existed between these people for a long time, and it was settled. And when these people say that they didn't understand this instrument, it is too ridiculous for anything."

Mr. Joseph again referring to such settlement and to the defendants herein, also stated upon oath:

"Well, when I got $1,000 for them there wasn't no two happier people in the United States than they were to get the $1,000 under that deed."

The witness further referring to the defendants also testified:

"They understood that they were giving up,—that that second deed was wiped out, and that the railroad company got what it had under this old deed, and that acre of ground that had slipped down. That is what they thought they were giving up, and when they got that $1,000 they were getting paid big. And they got the right to construct a road there and have a crossing."

In answer to the question, "And Mr. Joseph, when you approved this deed and had them sign it, you understood that they were conveying to the railroad company what you have just testified, is that right?" The witness replied, "That is right." Thereupon the defendants' counsel, addressing the witness and the court, announced: "That is all. If your Honor please,

in view of Mr. Joseph's testimony, it would be uselessly consuming the time of the court to proceed with this case. I feel that under his testimony I would not be justified in offering any further testimony, because he was their attorney, and, while the clients do not agree with him, he was their attorney and they have offered him as a witness and they cannot contradict him, as I understand it, and I will have to abide by it."

2. This declaration conceded the final adjudication of one of the issues involved. The announcement, having been approved by the court, forever settled the question that the defendants' deed of April 2, 1907, was knowingly executed by them as a substitute for, and in lieu of their conveyance of July 11, 1906, as much so as if the latter deed had never been made. As there had been no abandonment by the Railway Company of any part of its original right of way across the lands of Mrs. Reed, so that they might possibly have been reinvested with the title thereto as granted by their predecessor Willer, and reserved by their deed of July 11, 1906, the solemn declaration so made by their counsel, and justified from a preponderance of the evidence received, precludes the possibility of his clients securing a reformation of their grant evidenced by the deed of April 2, 1907.

Notwithstanding such asseveration, the trial of the cause was continued as to the remaining issues, namely, the right of the defendants to have crossings constructed and maintained by the Railway Company across its tract for their accommodation, as evidenced by the grant made by Willer, and as to the damages resulting to their premises by reason of trespasses alleged to have been committed thereon by the Railroad Company. The defendants' counsel, referring

to the original grant of the right of way and to his clients, remarked: "We think the crossings reserved in the Willer deed run with the land; that they are entitled to them, and of course the 1907 deed provides for a crossing for the Reeds." The court replied: "I think there isn't any dispute about that. In fact, the Railroad Company had admitted here that you are entitled to that, and you certainly are." The plaintiff's counsel: "There is no doubt about it." The Court: "There is no doubt about it. There will be no trouble about it." The plaintiff's counsel: "Now, if there is any question about the Willer deed, we can offer it in evidence here." The Court: "Very well." Thereupon such deed was received in evidence.

3. It will be remembered that by the original conveyance of the right of way, the plaintiff's predecessor stipulated to provide and maintain for Willer's use two wagon-road crossings, one of which was to be on the county road. This reservation having been restricted to Willer's use only and not extending to his assigns it is questionable if the specified rights run with the land, or were anything more than personal covenants. In the absence of any evidence in relation to the matter, the reference in the reservation to a county road might create an inference that the highway so designated was then *in esse* annexed to and a part of the land, and for that reason the Railway Company was required to perform the terms of its agreement in favor of Willer's assigns, without express words to that effect: *Brown* v. *Southern Pacific Co.*, 36 Or. 128 (58 Pac. 1104, 78 Am. St. Rep. 761, 47 L. R. A. 409). From an examination of the blue print referred to, it would seem that the county road had been abandoned for a "gate" is indicated upon the print on the line where the highway originally crossed

the railway track. But however this may be, it will be taken for granted, from the observations of the court and counsel for the respective parties, that the rights of crossing provided for in the Willer deed run with the land and became vested in Mrs. Reed. The deed executed by the defendants to the Railway Company April 2, 1907, made no mention of such reservations and provided only for a private crossing to be made and maintained by the grantors. Whether or not the deed executed by Willer and the conveyance made by the defendants July 11, 1906, granted more than an easement, it is not necessary now to determine. The deed made by Mr. and Mrs. Reed April 2, 1907, unquestionably transferred the fee to the premises therein described. This conveyance though permitting the defendants to make and maintain a private crossing over the railroad, cut off and forever extinguished all parts of the crossings specified in the Willer deed, that lie north of the south boundary of the right of way granted by the defendants April 2, 1907. Measuring the lines as indicated by the scale noted on the blue print, the two crossings mentioned in the Willer deed, as illustrated on that map, extend from the original south boundary of that grant northerly 50 feet and 20 feet, respectively, where is encountered the south boundary of the land granted in fee April 2, 1907, across which latter described premises, to a distance of 100 feet in each instance, no right to pass is reserved, except the defendants' right to make and maintain a private crossing to be protected at each end by gates.

4. If the south line of the last granted right of way were fenced, the defendants would be entitled under the provisions of the Willer deed to pass over the original crossings northerly from the south boundary

of this grant, 50 feet on one of the crossings and 20 feet on the other to the line of the supposed fence, but neither Mr. nor Mrs. Reed, nor their agents, could legally go farther north than the protecting inclosure which would then mark the south boundary of the premises granted April 2, 1907, except along the private crossing which is particularly specified in the deed of that date. Diminishing the boundary of the land so granted by Willer to the Railway Company by the strip taken therefrom by the defendants' conveyance of the fee, no right to cross any part of the premises last particularly described can possibly be found in their favor by the most liberal construction of the two grants, when read together, except the private right of crossing mentioned. The trial court, therefore, properly restricted the right of Mr. and Mrs. Reed, their agents, etc., to the private crossing of the railway track to be made and maintained by them at the place designated in their latest conveyance to the plaintiff's predecessor, which grant overlapped the greater part of the strip conveyed by Willer.

5, 6. The deed of April 2, 1907, having been executed, as the evidence shows, with the intent of granting to the Railway Company all that portion of the Willer strip of land that is not embraced in the premises so conveyed by the defendants in fee, in order that the old tunnel might be used as a part of a contemplated double track at that place, there was no equity whatever in the cross-bill interposed herein. This being so, the element of damages which the defendants may have sustained is necessarily eliminated, for the right to recover such compensation in a suit must depend upon some equity which enables the court to secure and retain jurisdiction of the subject matter, and as an incident thereof to award the damages inflicted:

Fleischner v. *Citizens' Real Estate & Investment Co.*, 25 Or. 119 (35 Pac. 174); *Bishop* v. *Baisley*, 28 Or. 119 (41 Pac. 937); *West* v. *Washington Ry. Co.*, 49 Or. 436 (90 Pac. 666); *Bernard* v. *Willamette Box & Lbr. Co.*, 64 Or. 223 (129 Pac. 1039); *Shultz* v. *Shively*, 72 Or. 450 (143 Pac. 1115). Where, however, at the hearing of a cause if it be found that the equity upon which the case was predicated does not exist, the suit is thereupon terminated and cannot be tried for the purpose of ascertaining any alleged legal right that may exist between the parties: *Burrage* v. *Bonanza etc. Min. Co.*, 12 Or. 169 (6 Pac. 766); *Ming Yue* v. *Coos Bay R. R. Co.*, 24 Or. 392 (33 Pac. 641); *Allen* v. *Elwert*, 29 Or. 428 (44 Pac. 824, 48 Pac. 54); *Denny* v. *McCown*, 34 Or. 47 (54 Pac. 952); *Multnomah County* v. *Portland Cracker Co.*, 49 Or. 345 (90 Pac. 155); *Hetrick* v. *Gerlinger Motor Car Co.*, 84 Or. 133 (164 Pac. 379).

The rules of law thus firmly established in this state preclude an examination of the questions of damages alleged in the cross-bill when the proof shows there was no equity therein. It follows from these considerations that the decree is modified, so as to exclude any determination of the damages alleged to have been sustained.

MODIFIED. REHEARING DENIED.
SUPPLEMENTAL PETITION FOR REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE BURNETT concur.

Rehearing denied January 29, supplemental petition for rehearing denied February 19, 1918.

PETITION FOR REHEARING.

(170 Pac. 300.)

On petition for rehearing. Denied.

Mr. Arthur C. Spencer, Mr. William W. Cotton, Mr. W. A. Robbins and *Mr. Charles E. Cochran,* for the petition.

Mr. Ralph R. Duniway, contra.

Department 2. MR. JUSTICE MOORE delivered the opinion of the court.

In a petition for a rehearing it is maintained by plaintiff's counsel that in refusing to consider the question of damages alleged to have been sustained by the defendant, Minnie T. Reed, when it was found she had suffered no injury, the rule of law governing the cause was misapplied by this court. It is argued that the complaint in her suit against the plaintiff herein not only sought a reformation of her right of way deed, on the ground of fraud practiced in procuring it, but such pleading also averred that the plaintiff's agents had trespassed upon her land by destroying fences, tearing out culverts, diverting water from its natural channel and cutting brush and leaving it upon her premises to her damage, for the redress of which injuries she had no plain, speedy or adequate remedy at law; that such statements of fact constitute separate grounds for equitable interference; that issues were joined thereon and evidence received in respect thereto; that because it was found the charge of fraud had not been established, that conclusion did

not render her suit without equity as to the other matters set forth in the complaint therein, and hence the question of damages should have been considered and the decree affirmed, since a court of equity having secured jurisdiction for one purpose will retain the cause until the entire subject matter has been fully determined.

7. In states like Oregon where at all times the same judge presides at the trial of suits in equity and actions at law as they are called, these forums are entirely separate and distinct, and the rule is so elementary that it needs no citation of decisions in support thereof, that when a court of equity obtains jurisdiction of a cause for a particular purpose, it will retain and exercise the power to hear and determine all the necessary incidents depending thereon, though they may involve purely legal matters as a part of the relief to be awarded. The decree in such a case is based upon the ground that equitable substance in the light of judicial experience necessarily casts a shadow, but when the essential equitable foundation is found at the trial to be insufficient, the legal superstructure undertaken to be erected thereon inevitably falls. As tending to uphold the legal principle contended for by plaintiff's counsel, they cite and rely upon the case of *Cody Lumber Co.* v. *Coach,* 76 Or. 106 (146 Pac. 973). There the defendants Arthur T. Coach, Joseph M. Coach and Mary E. Cary, commenced an action at law against the plaintiff, the Cody Lumber Co., a corporation, to recover the amount of seven promissory notes executed by the latter. The corporation answered the complaint, and availing itself of the remedy prescribed by Section 390, L. O. L., filed as plaintiff a cross-bill in equity, alleging that the notes sued upon were subject to adjustment, in accordance with the terms of an

agreement whereby the sawmill tally of logs for the purchase of which the notes were given, should be settled, setting forth a copy of the contract. The averments of the cross-bill were denied by an answer which also set forth new matter as a separate defense. The allegations of such new matter were denied by the reply. Notwithstanding the interposition of a cross-bill, by express provision of the statute (Section 390, L. O. L.) stays the prosecution of a law action until a decree is rendered in the equity suit, the parties in the case mentioned stipulated that the action and suit should be heard and determined at the same time. The effect of such an agreement was to waive a trial by jury in the law action. From the evidence received in that case a judgment was given in favor of the holders of the promissory notes for the amounts thereof as demanded in the complaint in the law action, thereby impliedly finding that the cross-bill was without equity, from which final determination the corporation appealed. As no relief prayed for in the cross-bill was awarded by the trial court or upon appeal, any conclusion there reached is not controlling herein.

8, 9. A continuing trespass committed upon the real property of another, tending to a removal of earth or of any substance therein or permanently attached thereto, will usually be enjoined in a suit instituted for that purpose by the party sustaining the injury: *Kitcherside* v. *Myers,* 10 Or. 21; *Mendenhall* v. *Harrisburg Water Co.*, 27 Or. 38 (39 Pac. 399); *Allen* v. *Dunlap,* 24 Or. 229 (33 Pac. 675); *Bishop* v. *Baisley,* 28 Or. 119 (41 Pac. 936); *Muldrick* v. *Brown,* 37 Or. 185 (61 Pac. 428); *Chapman* v. *Dean,* 58 Or. 475 (115 Pac. 154); *Mathews* v. *Chambers Power Co.,* 81 Or. 251 (159 Pac. 564). These cases proceed upon the theory

that a trespass threatened or committed will injure or destroy the substance of the owner's estate in the land, in the manner in which the premises have been kept or used. Where the recurrence of the injury is not reasonably to be apprehended, the remedy at law for the recovery of the damages inflicted is usually regarded as adequate, and relief by injunction will usually be denied: *Garrett* v. *Bishop,* 27 Or. 349 (41 Pac. 10).

10–12. The testimony given at the trial herein tends to show that the brush left upon Mrs. Reed's land was cut by her permission along the right of way by the plaintiff's agents, in order that a better view of the semaphore might be obtained by locomotive engineers having charge of trains going west from the tunnel. The cutting of the shrubs was therefore not a trespass. If, by leaving upon the land the brush when it should have been burned after it was cut, Mrs. Reed was injured, her remedy for the wrong thus inflicted was the expense reasonably to be incurred in removing the brush, and not the damages which might result by reason of her inability to use the land for grazing or other agricultural purposes. An action at law to recover the outlay thus necessitated affords an adequate remedy and no exigency exists for resorting to a court of equity.

It also appears that the fences alleged to have been destroyed were the protecting inclosures put up along the lines of the original right of way by the plaintiff's servants, which fences were removed and rebuilt by such employees along the revised lines. The authority thus to move these fences seems to be unquestioned, and if Mrs. Reed sustained any injury in consequence of the alteration, no reason has been dis-

closed why she should apply to a court of equity for the recovery of damages in this particular.

13. In building the altered roadbed a fill of earth was made west of the tunnel and a small brook originally flowing north was diverted from its channel and conducted in a ditch dug on the south side of the grade, whereby the water emptied into another stream which flowed through a culvert placed in the embankment. The testimony tends to show that by reason of this change water seeped from the ditch and percolated beneath the fill thereby making a part of Mrs. Reed's land, north of the embankment, moist and injuring the premises for pasturage. It further appears that the united waters had so accelerated the volume in the stream as to cause a quantity of soil to be washed away from the banks of the augmented channel. It would thus seem that a continuing trespass upon her real property had been thereby committed by the plaintiff's agents, and it remains to be seen whether or not injunctive relief can be awarded after the railroad has been built and is being operated. It must be admitted that if flowing water was diverted from its natural channel without Mrs. Reed's consent, the change in the current would appear to be unauthorized: *Hord* v. *Holston River R. Co.,* 122 Tenn. 399 (123 S. W. 637, 135 Am. St. Rep. 878, 19 Ann. Cas. 331, 336).

A text-writer in speaking of the equitable remedy in a case of that kind, remarks:

"To entitle one to relief by injunction against the construction of a railroad over his land, he must use due diligence in the assertion of his rights, since the relief will not be granted in favor of one who has been guilty of laches, and who has by his own conduct given an implied assent to the construction of the work which he afterwards seeks to restrain": 1 High, Inj. (4 ed.) § 618.

Another author in discussing this subject, observes: "The courts may, it seems, take into consideration the fact that companies are common carriers and *quasi* public in their nature, and refuse to grant an injunction for slight cause where it would prevent or obstruct the operation of the road and not only cause great injury to it, but also inconvenience the public": 1 Elliott, Railroads (2 ed.), § 628.

14. The revised line of railroad was completed and trains were operated thereon in September, 1908. Prior to that time the roadbed was graded and the water flowing in the brook had been diverted. The cross-bill herein was not filed until August 3, 1915. For nearly seven years Mrs. Reed, though living near the tunnel and aware of all the changes as they were being made, never applied to any court for redress of the injuries of which she now complains. Her long delay in this respect precludes equitable intervention in her behalf as to the diversion of the water and the destruction of the culvert, as originally built for that brook. If, therefore, Mrs. Reed has any remedy it is by an action at law and not by a suit in equity.

15, 16. The facts alleged in the complaint in the suit in equity by Mrs. Reed against the Oregon-Washington Railroad & Navigation Company might as well have been set forth as a separate defense in the latter's suit in equity against her and her husband, and thereby have avoided the bringing of more than one suit. As she commenced a separate suit, however, for injunctive relief when it was unnecessary to do so, her complaint partakes of the nature of an equitable counterclaim. To this complaint a demurrer was interposed on the ground *inter alia* that there was no equity in the bill. The demurrer was overruled and an answer filed denying the material averments of the complaint and setting forth as a separate defense the facts in

substance as alleged in the complaint in the suit of the Oregon-Washington Railroad & Navigation Company against Mr. and Mrs. Reed, and praying for injunctive relief as therein sought. We do not understand the rule that an objection to the jurisdiction in equity comes too late after the defendant by his answer asks for affirmative relief, as announced in *Kitcherside* v. *Myers,* 10 Or. 21, and followed in subsequent cases is controlling herein. Those cases are based upon the assumption that if either the complaint or the answer states facts showing a right to equitable relief, the pleading is sufficient for that purpose and jurisdiction of the cause will be taken. In the case at bar Mrs. Reed's complaint inaugurating a separate suit, was sufficient to invoke an exercise of equitable jurisdiction. The affirmative relief asked in the answer to that complaint gave no further right, and when her bill was found to be without equity, there remained no foundation upon which could be predicated her claim for damages. Such being the case, the motion should be denied and it is so ordered.

MODIFIED. REHEARING DENIED.
SUPPLEMENTAL PETITION FOR REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Argued December 5, affirmed December 27, 1917, rehearing denied January 29, supplemental petition for rehearing denied February 19, 1918.

REED *v.* OREGON-WASH. R. & N. CO.

(169 Pac. 346.)

From Multnomah: HENRY E. McGINN, Judge.

This is a suit by Minnie T. Reed against the Oregon-Washington Railroad & Navigation Company, a corporation, to reform a deed and enjoin trespassing upon plaintiff's premises. From a decree adverse to plaintiff, she appealed. Affirmed.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway.*

For respondent there was a brief over the names of *Mr. Arthur C. Spencer, Mr. William W. Cotton, Mr. W. A. Robbins* and *Mr. Charles E. Cochran,* with an oral argument by *Mr. Spencer.*

Department 2. MR. JUSTICE MOORE delivered the opinion of the court.

This suit was commenced July 28, 1915, by Minnie T. Reed against the Oregon-Washington Railroad & Navigation Company, a corporation, to reform a deed executed April 2, 1907, by the plaintiff and her husband to the defendant's predecessor; to enjoin interference with or trespassing upon her real property, and to recover $3,000 as damages for injuries to her lands. The complaint in this suit is similar to the cross-bill filed in the case of the defendant herein as plaintiff against Mrs. Reed and her husband. The answer in this suit denies the material averments of the complaint, and for a further defense sets forth

the facts in substance as stated in the complaint in the suit last mentioned. The reply herein put in issue the allegations of new matter in the answer to which it is responsive. Based on these issues the cause was tried with that of the Oregon–Washington Railroad & Navigation Company, a corporation, against Frank H. Reed and Minnie T. Reed, resulting in special findings by the jury as detailed in the statement of facts preceding the opinion in that case. Founded upon these special verdicts and a consideration of the evidence received, it was decreed that the Railroad Company was the owner and entitled to the possession of all the real property conveyed to it April 2, 1907, by Mr. and Mrs. Reed, who with their agents, etc., were perpetually enjoined from interfering with or trespassing upon such real property, except at a private right of way to be made and maintained by them across the railway track in such a manner, however, as not actually, imminently or potentially to injure the Railroad Company or prevent it from using such real property for railway purposes, and refusing to award to Mrs. Reed any damages. From this decree she appeals.

The facts involved in the case of the Oregon-Washington Railroad & Navigation Company against Mr. and Mrs. Reed, and the reasons upon which our decision rests, are deemed to have been sufficiently set forth in the opinion in that suit, thereby rendering it unnecessary further to consider any of the questions presented by this appeal. The decree herein is therefore affirmed. AFFIRMED. REHEARING DENIED.

SUPPLEMENTAL PETITION FOR REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE BURNETT concur.

Argued January 23, reversed and decree rendered February 5, rehearing denied February 19, 1918.

FIRST NAT. BANK *v.* MULTNOMAH STATE BANK.

(170 Pac. 534.)

Injunction—Sale of Stock for Illegal Assessment.

1. Suit in equity for protection of a private right being allowed by Section 389, L. O. L., where action at law cannot furnish a plain, speedy and adequate remedy, sale of stock for an illegal assessment may be enjoined.

Corporations—Pledge of Stock—Protection by Pledgee.

2. The pledgee of stock may maintain suit to protect his rights in and to it where the pledgor might have done so.

Constitutional Law—Obligation of Contracts—Amendment of Constitution—Charter of Corporation.

3. Stock in a bank subscribed for when Article XI, Section 3, of the Constitution, provided, as it did when the corporation was created, that stockholders should be liable for the corporation's indebtedness only to the amount of their unpaid subscription, was not subject to the subsequent amendment (see Laws 1913, p. 8) imposing a double liability on stockholders in a bank.

Constitutional Law—Obligation of Contracts—Corporations—Liability of Stock.

4. A bank having been incorporated when Article XI, Section 3, of the Constitution, provided that stockholders should be liable for the corporation's indebtedness only to the extent of their unpaid subscription, holders of stock subscribed for after the going into effect of the amendment of Section 4585, L. O. L., by Laws of 1911, page 243, increasing the liability, was not subject thereto; the charter controlling.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is a suit to enjoin the sale of bank stock and to enforce a lien thereon. The cause being at issue, was tried upon an agreed statement of facts to the effect that the plaintiff, the First National Bank of St. Johns, Oregon, is a corporation; that the defendant, the Multnomah State Bank, is also a corporation and was organized under the laws of the State of Oregon April 1, 1911, and that the codefendants are its officers and

directors; that on December 26, 1911, H. Rostad subscribed for and paid $3,000 the par value of 30 shares of the capital stock of the defendant bank, consisting of four certificates giving the number of each respectively, which written evidence was delivered to him; that on January 2, 1914, he borrowed from the plaintiff $2,000 for which he gave a promissory note, and to insure the payment thereof, pledged and assigned his stock to the plaintiff which holds it as collateral security; that the Superintendent of Banks of the State of Oregon on December 15, 1914, from an examination of the financial conditions of the defendant bank, determined that its capital stock had been impaired below the specified amount to the extent of $15,000, the entire par value thereof, and then notified the defendant officers to make good the decrease; that pursuant thereto a meeting of the stockholders was duly called, upon whom, including Rostad, notice was served, but neither he nor the plaintiff nor a representative of either attended the meeting, at which a resolution was adopted attempting to levy an assessment of $100 a share on all the stock of the defendant bank, which sum was declared to be payable in 60 days after notice thereof; that such information was duly given, but no payment on account of the stock so held by the plaintiff has ever been made, nor did it or Rostad ever consent to the assessment; that by reason of the failure to pay any part of that sum, the officers of the bank ordered the 30 shares of stock to be sold, and unless restrained such stock will be sold for the purpose of collecting the amount so attempted to be assessed. Based thereon it was determined that the equities were with the defendants, whereupon the suit was dismissed and the plaintiff appeals.

REVERSED AND DECREE RENDERED.

For appellant there was a brief over the names of *Mr. Omar C. Spencer* and *Messrs. Carey & Kerr,* with an oral argument by *Mr. Spencer.*

For respondents there was a brief and an oral argument by *Mr. Charles A. Johns.*

Mr. Justice Moore delivered the opinion of the court.

1, 2. It is insisted by defendants' counsel that no error was committed in dismissing the suit, for that the plaintiff had an adequate remedy at law for the recovery of any damages it might have sustained by reason of the threatened sale of the property. The case relied upon as sustaining this view is that of *Parsons* v. *Hartman,* 25 Or. 547 (37 Pac. 61, 42 Am. St. Rep. 803, 30 L. R. A. 98), where it was held that a suit by a judgment debtor would not lie to enjoin the sale of personal property under execution, upon the ground that it was exempt by law from sale under judicial process, unless the property was a keepsake or memento of some kind and for that reason possessed a special value to the owner, the loss of which could not be compensated in damages, since the judgment debtor had an adequate remedy at law for the unlawful seizure or detention, except as to property possessing such peculiar value. In a note to that case in 30 L. R. A. 98, 99, it is said:

"The case of *Parsons* v. *Hartman* denies the right to obtain an injunction against an execution sale of exempt personal property. There is some conflict of authorities on this question, but where there is a special statutory remedy, that is quick, adequate, and affords the same relief as would be obtained by injunction, as in *Parsons* v. *Hartman,* the rule adopted in that case is supported by some authorities. But

where the objection to the injunction is, that there is a remedy by replevin, trover, damages, or the like, the weight of authority is in favor of granting the injunction."

Shares of stock in a corporation, though treated as personal property, are in the nature of choses in action: Helliwell, Stock & Stockholders, § 9; *Commonwealth* v. *Peebles,* 134 Ky. 121 (119 S. W. 774, 20 Ann. Cas. 724, 23 L. R. A. (N. S.) 1130). A clause of the stipulation of facts, which was adopted by the court in referring to such property reads:

"Said stock hereinbefore listed is now in the possession of plaintiff subject to its claim therein as herein set out, and is now shown by the books of the defendant bank to be owned by H. Rostad."

The facts so agreed upon show that though Rostad assigned and delivered his shares of stock to the plaintiff to secure the payment of $2,000, as evidenced by his promissory note, it nowhere appears from an inspection of the transcript before us, whether or not a request was ever made to have noted upon the books of the defendant bank any memorandum that such certificates were held by the plaintiff as pledgee.

In this state a chattel mortgage when duly recorded creates only a lien upon the goods and chattels hypothecated, but upon a default in the conditional transfer, such lien is converted into a qualified ownership which entitles the mortgagee to the possession of the property: Section 7410, L. O. L; *Knowles* v. *Herbert,* 11 Or. 54, 240 (4 Pac. 126); *Backhaus* v. *Buells,* 43 Or. 558 (72 Pac. 976, 73 Pac. 342); *Ayre* v. *Hixson,* 53 Or. 19 (98 Pac. 515, 133 Am. St. Rep. 819, Ann. Cas. 1913E, 659); *Swank* v. *Elwert,* 55 Or. 487 (105 Pac. 901). A text-writer in speaking of the delivery of

property by a debtor to his creditor to hold until the liability is discharged, remarks:

"A pledge of stock is a bailment as security for an obligation. Contrary to the rule with reference to a mortgage of realty, the pledgee acquires the legal title to the property pledged. If the pledgor retains possession, he does so merely as the agent of the pledgee. Where stock is transferred as security for a debt by an assignment absolute on its face, parol evidence is admissible to show the true nature of the transaction. A court of equity, upon full facts shown, will give effect to the actual contract intended by the parties": Helliwell, Stock & Stockholders, § 356.

This author also observes:

"Where the pledgee is not apprehensive of liability, he may have stock transferred to himself, personally, on the corporate books. Where, however, there is danger of such liability, the pledgee may have the stock registered in his name 'as pledgee' in which case no liability attaches": Id., § 357.

Another author in commenting upon the right of a court of equity to restrain the sale of stock for an amount alleged to have been improperly levied thereon, in excess of the subscription price, says:

"Where an illegal assessment has been made, and the stock is about to be sold, a stockholder may enjoin the sale and cause the assessment to be set aside": 1 Cook, Corp. (6 ed.), § 134.

To the same effect, see also, 2 Clark & Mar. Priv. Corp., § 495; 10 Cyc. 489; *Redkey Citizens' Natural Gas etc. Co.* v. *Orr,* 27 Ind. App. 1 (60 N. E. 716). The assignment of stock as security for the payment of a debt, creates such a privity between the pledgee and pledgor that the former may maintain a suit in equity to protect his rights in and to the property, whenever the latter might have done so: 22 Am. & Eng. Ency. Law (2 ed.), 907; *Herbert Kraft Co. Bank* v.

Bank of Orland, 133 Cal. 64 (65 Pac. 143); *Farmers' Pawnee Canal Co.* v. *Henderson,* 46 Colo. 37 (102 Pac. 1063).

It is believed that an action at law could not have furnished the plaintiff as plain, speedy and adequate remedy as a suit in equity would have afforded: Section 389, L. O. L.; *South Portland Land Co.* v. *Munger,* 36 Or. 457 (54 Pac. 815, 60 Pac. 5); *Benson* v. *Keller,* 37 Or. 120 (60 Pac. 918); *Livesley* v. *Johnston,* 45 Or. 30 (76 Pac. 13, 946, 106 Am. St. Rep. 647, 65 L. R. A. 783); *Hall* v. *Dunn,* 52 Or. 475 (97 Pac. 811, 25 L. R. A. (N. S.) 193); *Dose* v. *Beatie,* 62 Or. 308 (123 Pac. 383, 125 Pac. 277); *Campbell's Automatic Safety Gas Burner Co.* v. *Hammer,* 78 Or. 612 (153 Pac. 475); *Butson* v. *Misz,* 81 Or. 607 (160 Pac. 530). This test being the criterion for invoking an exercise of chancery jurisdiction, the suit herein was properly brought in a court of equity.

3, 4. It is contended by plaintiff's counsel that when the defendant bank was incorporated and also when Rostad subscribed, paid the full par value thereof and received his certificates of stock, Article XI, Section 3, of the Constitution was as follows:

"The stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more."

That there then existed no reserve power whereby the articles of incorporation of any such artificial being or company could be altered, amended or repealed so as to increase the liability of a stockholder in excess of the sum so limited; that the clause of the organic law quoted made the charter of the defendant bank a contract between it and its stockholders, and between the latter and the state, thereby authorizing the holders of

corporate stock to invoke and rely upon Article I of Section 21 of the fundamental law of Oregon, which so far as material herein, reads: "No * * law impairing the obligations of contracts, shall ever be passed"; that a subsequent amendment was made to Article XI, Section 3, of the Organic Act, by adding to it this language:

"Excepting that the stockholders of corporations or joint stock companies conducting the business of banking shall be individually liable equally and ratably and not one for another, for the benefit of the depositors of said bank, to the amount of their stock, at the par value thereof, in addition to the par value of such shares": Laws Or. 1913, p. 8.

That no retroactive force was imparted by the amendment to the original clause of the Constitution, whereby any authority was granted to assess shares of stock which had been subscribed for, the par value thereof paid in full, and the certificates delivered prior to November 29, 1912, when the amendment went into effect; and that the attempt to impose upon the stock so held by the plaintiff an additional burden was violative of the Constitution of the United States and of the State of Oregon and void, and hence errors were committed in dismissing this suit and in not granting the relief prayed for in the complaint.

It is argued by defendant's counsel that the amendment of Section 4585, L. O. L., which went into effect May 20, 1911, or 90 days from February 18th of that year, the end of the legislative session (Const. Or., Art. IV, § 28), commanded the superintendent of banks, when it appeared to him that the capital stock of any state bank had been reduced below the amount specified in its articles of incorporation, to notify the officers and directors of such bank to make good the impairment within 90 days from the requisition, where-

upon it became incumbent upon such officers and directors immediately to call a meeting of the stockholders for that purpose (Laws Or. 1911, Chap. 171, p. 243); and that such enactment so far as it relates to the collection of an assessment levied upon bank stock is a change in the method of procedure only and for that reason is not violative of any constitutional right which is guaranteed to a stockholder. The case relied upon as sustaining the argument adduced is that of *Commercial Nat. Bank* v. *Weinhard,* 192 U. S. 243 (48 L. Ed. 425, 24 Sup. Ct. Rep. 253), where it was held that Section 5205, Rev. Stats. U. S., was intended to and did confer upon a national banking association the privilege of declining to levy the assessment to make good a deficiency in its capital after notice by the Comptroller of the Currency so to do, and to elect instead to wind up the bank under Section 5220; that the shareholders and not the directors have the right to decide which course should be pursued; and that an assessment made upon the shares by the directors, without action by the stockholders, was void. The Federal procedure thus adverted to seems to have been adopted by the enactment of our banking law upon the same subject. The case thus cited is applicable only to the extent that the assessment undertaken to be levied in this instance was made by the stockholders, but that circumstance is unimportant if the burden attempted to be imposed trenched upon any constitutional assurance. A statute, however, which gives an additional remedy against a stockholder, without increasing his pre-existing liability, has been held not to impair the obligation of the contract: *Harrison* v. *Remington Paper Co.,* 140 Fed. 385 (72 C. C. A. 405, 5 Ann. Cas. 314, 324, and note, 3 L. R. A. (N. S.) 954). But that rule has no application herein.

It is further argued by defendants' counsel that the assessment was made against the stock only, that no personal liability was attempted to be imposed upon the stockholders, and that though stock may be sold for a delinquent assessment, such procedure is not in conflict with any provision of the organic law of Oregon. In support of this assertion, reliance is had upon the case of *Wall* v. *Basin Mining Co.*, 16 Idaho, 313 (101 Pac. 733, 22 L. R. A. (N. S.) 1013), a head-note to which reads:

"Section 17 of Article II of the Constitution of this State, which provides, 'Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him,' relates to and limits the personal liability of a stockholder, but in no way limits the power of the corporation to make assessments upon stock fully paid up, and to subject such stock to sale in default of the payment of such assessment."

It will be remembered that the amendment made in November, 1912, to Article XI, Section 3, of the Constitution of this State, declares:

"That the stockholders of all corporations * * conducting the business of banking shall be individually liable, equally and ratably and not one for another, for the benefit of the depositors of said bank, to the amount of their stock, or the par value thereof, in addition to the par value of such shares."

It will thus be seen that our Constitution places a personal liability upon stockholders of a bank, and hence the case last cited is not controlling herein.

Considering the legal principles put forth by plaintiff's counsel, the rule is firmly established that a charter is a contract between the corporation and its stockholders, and also between them and the State,

which act of incorporation will be protected by the United States Constitution: 2 Cook, Corp. (4 ed.), §§ 493, 495. This author at Section 497 of that volume, says:

"A statute passed subsequently to the granting of a charter, and increasing the liability of a stockholder on his stock for debts already incurred, is unconstitutional and void unless the legislature has reserved the right to alter or amend the charter."

No power was reserved whereby the legislative assembly was authorized to impose the burden undertaken to be laid by the amendment of Section 4585, L. O. L. That enactment, it will be kept in mind, went into effect after the defendant bank was incorporated but before Rostad subscribed for and received his certificates of stock. He and his pledgee, the plaintiff herein, had the right to rely upon the organic act that was in force when the defendant bank was incorporated, which fundamental law is superior to the amendment last mentioned.

In *Harrison* v. *Remington Paper Co.,* 140 Fed. 385 (72 C. C. A. 405, 5 Ann. Cas. 314, 3 L. R. A. (N. S.) 954), it was held that a stockholder of a corporation, by his subscription for stock or by his acceptance of it, agreed with the corporation and its creditors that he would perform the obligations and discharge the duties imposed upon a stockholder by the Constitution, the statutes, and the law then in force; that his liability to creditors sprang from that contract; and that any repeal or change of the remedies of a creditor of a corporation against its stockholders which substantially obstructed or retarded the enforcement or lessened the value of the agreement, impaired its obligation, and was unconstitutional and void.

In *Converse, Receiver,* v. *Aetna Nat. Bank,* 79 Conn. 163 (64 Atl. 341, 7 Ann. Cas. 75), in construing a statute of Minnesota, it was decided that the amount for which a stockholder could be assessed to pay the debts of a corporation, in the event of its insolvency, depended upon and was determined by the laws of the state creating the corporation, which enactments were in force when he became a stockholder; that the mode of enforcing the obligation which was contractual in its nature might be varied within reasonable limits by subsequent legislation, but its amount could not thereafter be materially increased without the stockholder's assent.

In *Yoncalla State Bank* v. *Gemmill,* 134 Minn. 334 (159 N. W. 798, L. R. A. 1917A, 1223), Section 3 of Article XI of the organic law of this state was construed, a head-note reading:

"At the time the plaintiff, a state bank of Oregon, was organized and defendant became owner of shares of stock therein the Constitution of said state contained no provision reserving in the state the right to amend or alter the charter of the bank so as to increase the obligations of its stockholders, but on the contrary a provision of the Constitution at that time did guarantee that a stockholder should not be liable beyond the unpaid par value of the shares of stock owned. A subsequent amendment of said provision imposing a double liability upon stockholders in banks, cannot be held to embrace those who become such previous to the adoption of the amendment."

In *Norris Safe & Lock Co.* v. *Weaver,* 81 Or. 670, 672 (160 Pac. 807), Mr. Justice BURNETT, referring to the effect of such amendment, remarks:

"Neither can it be made to impair the obligation of a subscription contract made before its adoption so as to double the original liability. So far as the increased responsibility is concerned, the utmost effect

it can have is to operate in favor of the depositors in a bank incorporated since the Constitution was so amended."

From the time the decision was rendered in the famous case of *Dartmouth College* v. *Woodward,* 4 Wheat. (U. S.) 518 (4 L. Ed. 629), to the present, it has been uniformly held that any legislation that impairs the terms or conditions of a pre-existing contract is void: *State ex rel.* v. *Sears,* 29 Or. 580 (43 Pac. 482, 46 Pac. 785, 54 Am. St. Rep. 808); *Lorntsen* v. *Union Fisherman's Co.,* 71 Or. 540, 544 (143 Pac. 621).

The amendment of the clause of the Constitution referred to cannot be invoked to impair the obligations of the pre-existing contract between the stockholders of the defendant bank and that corporation, nor to abridge the agreement existing between such stockholders and the State of Oregon, and this being so the decree is reversed and one will be entered here granting to the plaintiff the relief prayed for in its complaint. REVERSED AND DECREE RENDERED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Argued December 13, 1917, modified January 15, rehearing denied February 19, 1918.

CITY OF EUGENE *v.* GARRETT.*

(169 Pac. 649; 170 Pac. 731.)

Municipal Corporations—Streets—Power to Vacate.

1. Charter of Eugene (Sp. Laws 1905, p. 254) Section 48, subdivision 36, provides for the vacation of any street or alley upon the petition or with the consent of not less than three fourths of the owners of property adjoining or abutting thereon, and the passage of an ordinance providing for improvement of a 90-foot street as a 70-foot street, without such petition or consent, could not have the effect of vacating any portion of the street.

Dedication—Abandonment of Part of Street—Right to Open.

2. Where a street was dedicated 90 feet wide, and the city used but 70 feet of the width although it improved the street by grade and macadam, and it was desired that the street be narrowed to 70 feet, which had not been done, as the property owners knew, or by reasonable diligence could have known, they took chances in improving their lots, and the city is not estopped to claim the full width of the street.

[As to what amounts to a dedication of a highway, see note in 57 **Am. St. Rep.** 749.]

Evidence—Judicial Notice—City Limits—Public Survey.

3. In a proceeding under Sections 3276 and 3284, L. O. L., to vacate streets and alleys, where the petition does not state that the addition is without the boundaries of the city, the court, where the limits of the city are fixed by legislative charter, may take judicial notice thereof, and likewise of the public survey of a donation land claim named upon a plat and mentioned in the petition.

Municipal Corporations — Abandonment of Street — Acts of Public Officers.

4. Where the board of regents of the University relied upon a decree quieting title and registering land which they purchased for the state, and upon an agreement they had with the city by which the latter secured the use of sufficient area to make a 70-foot street along certain land, the city could not go beyond such agreement and appropriate land belonging to the state.

PETITION FOR REHEARING.

Municipal Corporations—Streets—Constructive Occupation.

5. Possession and user of a part of width of a street within the limits of the duly recorded dedication amounts constructively to an

*As to estoppel of municipality to assert true line, where abutting owner has made improvements with what was erroneously supposed to be street boundary line, see note in 7 **L. R. A. (N. S.)** 243.

As to estoppel of municipality to open or use street, see note in 46 **L. R. A. (N. S.)** 1211. REPORTER.

occupation of its entire dedicated width, and is possession sufficient for the purposes of a suit to establish the city's claim to the whole street.

Municipal Corporations—Streets—Obstructions—Removal.

6. A city, as trustee of streets for the use of the public, is in duty bound to remove all obstructions and encroachments which materially disturb the public user by whatever adequate, legal, or equitable means seem best.

Municipal Corporations—Streets—Obstructions—Abatement and Injunction.

7. Section 341, L. O. L., providing for abatement of nuisances, is not conclusive and may not be an appropriate remedy for removal of street obstructions, in a dispute between lot owners and the city, but where a public nuisance will cause irreparable damage or require numerous actions, equity has jurisdiction by way of the more efficacious remedy of injunction.

Department 1. Statement by MR. JUSTICE BEAN.

This is a suit to establish the right of the City of Eugene to a street known as Agate Avenue.

In 1890 "Fairmount" Lane County, Oregon, was platted into lots and blocks with streets and alleys. It was located some distance beyond the limits of the City of Eugene as the same then existed. The addition was embraced within the limits of the donation land claim of William Smith and wife, with the west line of the claim as the west line of Fairmount. The street on the west side was designated as Agate Avenue, and extended from the Oregon & C. R. R. right of way on the north to the south side of the platted portion of the claim. This street was platted and dedicated to the width of 53 feet to 60 feet; the variation being due to the fact that the west line of the claim did not coincide with the line of the street.

In 1891 University Addition to Eugene was platted with the east line the same as the west line of Fairmount, and the plat shows the street 90 feet wide from the east line of Agate Avenue. This would take 53 to 60 feet east of the claim line and 30 to 37 feet on the west of the claim line to make the width dedicated.

In 1892 the owners of Fairmount Addition filed an amended plat, subdividing some of the lots. This plat shows the west line of the lots facing on Agate Avenue, 11 feet farther west than the first in order to correct an error in the first plat and to conform to the stakes set in the ground marking that line of the lots.

In 1895 all that part of University Addition south of 15th Street was ordered vacated by the County Court of Lane County. Thereafter the owners of University Addition instituted a suit in the Circuit Court to quiet title to this tract of 34 acres, and to register the same under the Torrens Registration Act. After due service and publication of notice a decree was rendered in effect quieting the title and ordering the same registered. After this the title to the tract was acquired by the Board of Regents of the University of Oregon. This tract embraced all the land which was formerly a part of University Addition, from the south line of 15th Street to 18th Street. Both of the additions mentioned, were outside of the limits of the City of Eugene, and were not within the boundaries of any municipality, until the limits of the City of Eugene were extended by an act of the legislature in 1903, after which a portion of what was formerly University Addition, south of 18th Street, was platted as Gross Addition, and the plat was accepted by the city and duly recorded. In 1908 the city council of Eugene passed an ordinance providing for the improvement of Agate Avenue. The center line of the improvement was declared to be 10 feet east of the claim line above referred to. The street was then improved by grading 40 feet in width, with a high grade of macadam 16 feet wide in the center, of a 70 foot street. Wooden sidewalks were constructed

along the west side of the 70 foot line for a portion of the distance north of 15th Street, and some shade trees were planted which are now about twelve feet high. Gutters and drains were arranged to conform to this proposed line, and the plumbing of the property owners was connected with the sewers. By an agreement with the Board of Regents of the University the use of a sufficient area to make a 70 foot street along the 34 acre tract was obtained, and the fence on the east side of the tract was adjusted to this line agreed upon.

In 1914 the property owners along Agate Avenue petitioned the city council to take formal action to definitely determine the lines of the street. An ordinance was passed by the council declaring the street to be 70 feet in width and vacating the remaining portion. This ordinance however was vetoed by the mayor and never became effective. Therefore it cannot be further considered in connection with this case. This suit was instituted by the direction of the city officials to quiet title to the street to the width of 90 feet, as formerly dedicated.

The Circuit Court passed a decree establishing the line of the street as prayed for in the complaint, and the answering defendants appeal. The Board of Regents of the University made no appearance.

MODIFIED.

For appellants there was a brief over the names of *Mr. Sjur P. Ness* and *Messrs. Hewitt & Dillard,* with an oral argument by *Mr. Ness.*

For respondent there was a brief over the names of *Mr. O. H. Foster,* City Attorney, and *Messrs. Williams*

& Bean, with oral arguments by *Mr. Foster* and *Mr. John M. Williams.*

MR. JUSTICE BEAN delivered the opinion of the court.

The appealing defendants pleaded and claim that the city is estopped from asserting a right to more of the street than it improved after establishing the lines in making the improvement; that to change the street at this time would destroy public and private property that is the improvement of the street and the sidewalks and the parkings along the street; that the city could not acquire a right of way across the University grounds without the consent of the state authorities.

1, 2. We will first consider that part of Agate Avenue not adjacent to the University tract. The request to establish a seventy foot street and vacate the remainder thereof came principally from the property owners on the west side of the street and north of the University tract. Prior to 1909 this street had been used but little. It was then graded to the width of 40 feet with macadam in the center of the grade 16 feet in width. Sidewalks were constructed for a portion of the distance on the west side and some five or six dwelling-houses were built and some of the lots graded and adorned with shrubbery with a view to conforming to the proposed 70 foot street. None of the houses were built within the 90 foot street line but some of them are near that line. It appears from the evidence, taking into consideration all of the proceedings relating thereto, that it was proposed by some of the city officials, and desired by some of the property owners, that a 70 foot street should be established. This was never done. Most of the lot owners who made improvements on the west side of the street

knew that no portion of the 90 foot street had ever been vacated. All of them could with reasonable diligence have obtained such information. This is shown and recognized by their petition to the city council to vacate a portion of the street and establish the same seventy feet wide, as proposed by the ordinance which was vetoed by the mayor. Plainly expressed these lot owners took chances on the street being narrowed. Their request in this respect was denied. Subdivision 36 of the charter of the City of Eugene, Special Laws of Oregon, 1905, page 254, empowers the city council to provide for the vacation of any street or alley, upon the petition or with the consent of not less than three fourths of the owners of the property adjoining or abutting upon such street or alley or part thereof to be so vacated. The passage of the ordinance for the partial improvement of Agate Avenue and fixing the center line of the street, without the required petition or consent, could not have the effect of vacating a portion of the street. The municipal authorities have no right to sell or dispose of streets or alleys dedicated to the public except in the manner provided by law: *Christian* v. *Eugene,* 49 Or. 170, 174 (89 Pac. 419). It is contended on behalf of the defendants that the city is estopped from claiming a street 90 feet wide, for the reason it has never used any portion of the street outside of the 70 foot line, and has by its acts led the property owners to improve their property to that line. It is not usually expected that a city will improve all of its streets at one time. It may also if necessity requires, with the same propriety grade a portion of a street. When this street is permanently improved or paved, the work already done will not be lost. The evidence in the case does not disclose acts done by the adjoining proprietors which indicate that they in good faith, have claimed a part

of the highway as their own property, or have expended money on the faith of such a claim by adjusting their property to the highway as they claim it to be, so that such private rights are of more persuasive force than those of the public. In other words the city is not estopped by its acts from asserting its rights to the full width of this part of the street, under the rule adopted in this state in the cases of *Oliver* v. *Synhorst,* 48 Or. 292 (86 Pac. 376, 7 L. R. A. (N. S.) 243); *Schooling* v. *Harrisburg,* 42 Or. 494 (71 Pac. 605); *Oliver* v. *Synhorst,* 58 Or. 582 (109 Pac. 762, 115 Pac. 594); *Crusen* v. *Lebanon,* 64 Or. 593 (131 Pac. 316), and *Portland* v. *Inman-Poulsen Lumber Co.,* 66 Or. 86 (133 Pac. 829, Ann. Cas. 1915B, 400, 46 L. R. A. (N. S.) 1211).

3, 4. As to that portion of Agate Avenue between 15th Street and 18th Street, along the east side of the University tract a different situation is presented. It should be remembered that in 1895 upon the petition of the owners of University Addition the County Court of Lane County ordered vacated all that part of the streets and alleys of the addition south of the south line of 15th Street as designated upon the plat. This affected the 34 acre tract. The order was acted upon. Thereafter the owners of the tract instituted proceedings in the Circuit Court for the purpose of quieting the title to the tract and registering the same. After due service and publication of notice a decree was passed adjudging the Lane County Investment Company a corporation to be the owner in fee simple and in possession of said tract; and that no other person or corporation had any interest or claim of any kind to said land; and confirming such title, and ordering the same registered as provided by the statute. After this the 34 acre tract, extending to the east line of the

Fielding McMurray D. L. C. was conveyed to the Board of Regents of the University of Oregon, for University purposes.

It is contended on behalf of the city that the County Court was without jurisdiction to order a vacation of the streets and alleys for the reason that the petition therefor did not state that University Addition was not within the limits of any incorporated city or town, and did not show that the addition was outside the boundaries of the City of Eugene, in order to conform to the requirements of Sections 3276 or 3284, L. O. L. The city limits were then fixed by the legislative charter of Eugene, and the County Court could take judicial notice of the same and also of the public survey of the D. L. C. which was named upon the plat recorded and referred to in the petition: See 17 Am. & Eng. Enc. of Law (2 ed.), pp. 894, 940, and 913. However this may be we do not deem it necessary to decide as to the force of the order of vacation of the County Court. The decree of the Circuit Court precludes the city authorities from establishing Agate Avenue as 90 feet in width, along the east side of the University tract, so as to appropriate a portion of the land belonging to the state. The Board of Regents relied upon the title to the 34 acre tract according to the decree of the Circuit Court as they had a right to do. Equity does not demand that the title to the streets and alleys in that part of what was formerly University Addition should be disturbed, at the suit of a political division of the state. Such claim is not in harmony with the agreement made by the city officials and the Board of Regents, as mentioned above.

The decree of the lower court will be modified so as to exclude from the declaration of a street 90 feet in width, all that portion of Agate Avenue over the

University tract between 15th Street and 18th Street and affirmed as to the remainder of the decree. Neither party will recover costs in this court.

MODIFIED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Denied February 19, 1918.

PETITION FOR REHEARING.

(170 Pac. 731.)

On petition for rehearing. Rehearing denied.

Mr. Sjur P. Ness and *Messrs. Hewitt & Dillard,* for the petition.

Mr. O. H. Foster, City Attorney, and *Messrs. Williams & Bean, contra.*

Department 1. MR. JUSTICE BEAN delivered the opinion of the court.

In a petition for rehearing counsel for defendants urge that this is not a suit for equitable cognizance, for the reason that plaintiff has not shown that the land improved within the street is not in the possession of another. There is more than one ground for equitable interference.

It is conceded that Agate Avenue in the City of Eugene, was regularly dedicated as a public street to the width of 90 feet and that the plat and dedication were duly recorded. The fences and so forth mentioned in the answer of defendants indicate an encroachment upon this public highway.

5–7. It is also shown and unquestioned that a portion of the street is improved and occupied by the public

to the width of about 70 feet. Where there is possession and user of a part of the street within the well-defined limits of the dedication, record of which has been duly made, it amounts constructively to an occupation of the entire dedicated width as designated upon the plat in so far as the possession is necessary for the purposes of this suit: *Joy* v. *Stump,* 14 Or. 361 (12 Pac. 929). This rule has been applied to public highways where the question of adverse possession was involved and by analogy is applicable here: *Bayard* v. *Standard Oil Co.,* 38 Or. 438, 447 (63 Pac. 614). A city as trustee of streets for the use of the public is in duty bound to remove all obstructions and encroachments which materially disturb the public user. Any course may be adopted which is consistent with fundamental law and is adequate and best adapted to effect the desired result and protect the rights of the public in the street: 28 Cyc., p. 896. An unauthorized obstruction of a public highway is a nuisance: 37 Cyc., p. 247. The application of Section 341, L. O. L., providing for the abatement of a nuisance, or a summary removal, might not be appropriate in a case of this kind, where there is a difference of opinion between city officials and some dispute between lot owners and the city. The remedy provided by the section of the Code for nuisances is not conclusive; but whenever a nuisance will cause irreparable damage or require numerous actions equity has concurrent jurisdiction with courts of law and will enjoin continuance of the objectionable conditions: *Fleischner* v. *Citizens' Real Estate & Inv. Co.,* 25 Or. 119, 129 (35 Pac. 174); *Blagen* v. *Smith,* 34 Or. 394, 402 (56 Pac. 292, 44 L. R. A. 522); *Union Power Co.* v. *Lichty,* 42 Or. 563, 566 (71 Pac. 1044); *Morton* v. *Oregon S. L. Ry. Co.,* 48 Or. 444 (87 Pac. 151, 1046, 120 Am. St. Rep.

827, 7 L. R. A. (N. S.) 344). In legal effect the encroachments upon the street in question, or trespass upon the easement, constitute a purpresture or public nuisance. One of the earliest recognized forms of public nuisance with which equity has interfered is that of purpresture. The jurisdiction of equity in cases of purpresture, as well as of public nuisances, generally rests in the necessity of preventing mischief and avoiding vexatious litigation. This remedy is more efficacious than that at law: 1 High on Injunctions (4 ed.), § 759. We therefore feel safe in holding that equitable jurisdiction in this case is founded upon solid grounds.

The petition for rehearing proceeds at great length to discuss the questions of fact. In our former consideration of this case we carefully weighed the inconvenience of the interested property owners as compared with the rights of the public. However much circumlocution may be employed, the defense is an attempt to give the report of a committee of the city council recommending the passage of the ordinance vacating a portion of the street the same effect as the ordinance would have had if it had been regularly passed instead of culminating in defeat.

The petition for rehearing is denied.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued February 8, writ denied February 19, 1918.

BADURA *v.* MULTNOMAH COUNTY.

(170 Pac. 938.)

Infants—Support—Mother's Aid—Application.

1. Under Laws of 1913, page 75, entitling every woman who has children under the age of 16 years, and whose husband is dead, and the support of whose child or children is dependent wholly or partly upon her labor, to receive assistance from the county, an application by a widow for support which discloses that her husband left an estate consisting partly of life insurance, but which failed to disclose whether he died testate so that it could be determined to whom the property belonged, and also averred that the widow had no money in the bank, so that it did not appear that either of her children were dependent upon her labor, was insufficient to show that the applicant was entitled to support.

Mandamus—Compelling Court to Act on Petition.

2. Under Section 613, L. O. L., authorizing the issuance of a writ of *mandamus* to compel the performance of an act which the law specially enjoins as a duty resulting from an office, a petition by a widow for a writ of *mandamus* to compel the county juvenile court to act upon her application for aid from the county for the support of her children will be denied where the application fails to show that she is entitled to aid.

[As to right of private person to *mandamus* to enforce performance of duty by court or magistrate, see note in Ann. Cas. 1912A, 1118.]

Original *mandamus* proceeding in Supreme Court.

Mr. Glenn O. Holman, for the plaintiff.

Mr. Samuel H. Pierce and *Mr. Walter H. Evans,* District Attorney, for the defendant.

Department 2. MR. JUSTICE MOORE delivered the opinion of the court.

The petition of Mary Badura, filed in this court for an alternative writ of *mandamus,* to compel the Juvenile Court of Multnomah County, Oregon, to act upon her application for an allowance for her support as the widow of Joseph P. Badura, and for assistance in the maintenance of their two children who were then

under 16 years of age, states facts designed to show a right to the relief demanded.

Many of the averments of the petition are denied by an answer which alleges that the plaintiff's original application, addressed to that court, did not state facts sufficient to confer jurisdiction of the subject matter, detailing the particulars.

A reply put in issue the allegations of new matter in the answer. The cause was tried upon an agreed statement of facts from which it appears that the plaintiff, on September 22, 1914, filed in the Juvenile Court of that county her application for an allowance of money for the support of herself and of such children, founded upon Chapter 42, Gen. Laws Or. 1913, parts of which, as far as material herein, read:

"Every woman, who has one or more children under the age of sixteen years and whose husband is * * dead * * and whose support and the support of whose child or children is dependent wholly or partly upon her labor, shall be entitled to the assistance as provided for in this act for the support of herself and of her child or children: Section 1.

"Subject to subsequent provisions of this act, every woman, as provided in Section 1, who is herself, and all of whose children are wholly dependent upon her labor for support shall receive from the public moneys of the county in which she and her child or children reside the sum of ten dollars per month for one child, and if she have more than one residing with her, seven dollars and fifty cents per month for each of such additional children: Section 2.

"Subject to subsequent provisions of this act, every woman, as provided by Section 1, who is herself and all of whose children are, partly dependent upon her labor for support, shall receive from the public moneys of the county in which she and her child or children shall reside, such a sum per month as, added to her other income (other than that derived from her labor) shall be equal to the amount which she would receive

if she was subject to the provisions of Section 2 of this act: Section 3.

"The provisions of this act shall not apply to any child which has property of its own sufficient for its support. * * Section 4."

Though this act was amended (Gen. Laws Or. 1915, Chap. 90; Gen. Laws Or. 1917, Chap. 267), these proceedings seek payment of the sums of money prescribed by the original enactment until its alteration.

1. The copy of the plaintiff's original verified application does not show that her support or that of either of her two children is dependent wholly or in part upon her labor, nor is it apparent therefrom that either of these children has no property of its own from which its support is obtainable.

The application is in the form of questions and answers from which the following excerpts are taken:

"Q. If your husband is dead, state what property he left, including life insurance.

"A. $2,000 and $75 Degree Camp, $300 funeral and plot, $1,500 property, $400 sewer and living expenses since. * *

"Q. State what your income is, including the salary of any child or children that you may have employed.

"A. Have 3 cows but no income,—feed so high.

"Q. Have you any money in bank?

"A. No. * *

"Q. Are you employed away from home?

"A. No. * *

"Q. Do you own your own property?

"A. Yes.

"Q. What property have you, real or personal? State fully.

"A. 2 lots and house and barn, chicken-house; was offered $1,700 for it; 3 cows, boys own pony; 40 chickens. * *

"Q. Account of outstanding debts?

"A. I don't owe any; pay cash for everything; would rather do without than go in debt."

It would thus seem that after Mr. Badura's death, which occurred December 28, 1913, his life insurance, which was subsequently received, amounted to $2,375, out of which had been paid his funeral expenses, the support of his family thereafter accruing, and $400 on account of a sewer assessment, and that he also left other property of the value of $1,500. Whether he died testate is not disclosed by the application, and for that reason it cannot be determined to whom this money and property legally belong. Because the plaintiff had no money in the bank does not conclusively show she had none in her possession. It is possible that the two children, for whose support assistance is demanded, may have inherited or been bequeathed a part of the money and property which their father left. In the absence of any showing upon that subject, it does not necessarily follow that the lots, house and barn which Mrs. Badura owns were the property, valued at $1,500, which her husband left.

An issue of fact is made by the pleadings and evidence herein, which controversy differentiates this case from those of *Zachary* v. *Polk County Court,* 74 Or. 58 (144 Pac. 1182); *Finley* v. *Marion County,* 81 Or. 294 (159 Pac. 557); *Wolfe* v. *Marion County,* 81 Or. 297 (159 Pac. 558), where no disputes in relation thereto appear to have been involved.

2. The writ of *mandamus* may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office: L. O. L., § 613. The right to this special proceeding must be certain and made clearly to appear before a peremptory writ will be issued: *Mackin* v. *Portland Gas Co.,* 38 Or. 120 (61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596). In *State* v. *Multnomah County,* 82 Or. 428, 433 (161 Pac. 959), it was said:

"*Mandamus* will not lie unless the ministerial duty enjoined by law is free from doubt."

The case at bar, as made by the pleadings and evidence, fails to bring it within the rule thus prescribed. It would be an idle ceremony to compel the Juvenile Court of Multnomah County, Oregon, to act upon an application for the support of a widow and her minor children, when no other legal course could possibly be pursued or conclusion reached on the merits, under the showing made, than to deny the relief sought. Such being the case, the proceedings should be dismissed and it is so ordered. DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE HARRIS concur.

Submitted on briefs February 7, reversed and remanded February 19, 1918.

ELLIOTT *v.* LAWSON.

(170 Pac. 925.)

Continuance—Discretion—Exercise.

1. On application for a continuance, trial court should exercise its judicial discretion according to fixed legal principles in order to promote substantial justice.

Continuance—Denial—Propriety.

2. A member of the National Guard who was in federal service was granted a furlough to return to attend to some of his private business. While traveling in an automobile to connect with the only train that day leaving the locality and by which he could return to his regiment within the time specified by his furlough, he was served with summons and complaint. He had no more than a half hour in which to look up his attorney and advise him of the situation, which he did. Such guardsman was unable to advise his attorney of the circumstances, and his testimony was necessary to explain books of account necessary to his defense. *Held* that, as it is the policy of the law to give a party to an action his day in court or a sufficient opportunity to make any defense claimed by him, the denial of an application for a continuance on behalf of such national guardsman

to enable him to make his defense, it appearing that trial was had approximately a month after service of process, was an abuse of discretion, this being particularly true in view of the policy of the law as shown by Laws of 1917, page 515, relating to the suits to foreclose mortgages, and levy execution of judgment upon and against lands of soldiers and sailors in actual service.

From Crook: T. E. J. DUFFY, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is an action for $1,149.46, based upon seven different accounts assigned to plaintiff for collection; one for printing advertisements amounting to $111.35, and the others for balances on account of goods, wares and merchandise. The answer consists of general denials.

REVERSED AND REMANDED.

For appellant there was a brief submitted over the name of *Mr. Jay H. Upton.*

For respondent there was a brief prepared and submitted by the plaintiff, *Mr. M. R. Elliott.*

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant's attorney filed a motion for a continuance of the cause supported by his own affidavit showing substantially the following facts: Douglas Lawson is a resident of Prineville, Crook County, Oregon. In July, 1916, in response to the call of the President of the United States, the National Guard of the various States of the Union were called into the service of the United States for duty upon the Mexican Border. Although living in Oregon, the defendant was a member of the National Guard of the State of Massachusetts, and responding to the call enlisted with his regiment in the service of the United States. He was immediately sent with his regiment to the Mexican Border near El Paso, Texas. In the month of August

he was granted a furlough for the purpose of returning to Prineville to attend to certain private matters, by the terms of which he was to return to the regiment on August 31, 1916. For a few days prior to August 26, 1916, he had been in the City of Prineville, and on that day, while traveling in an automobile from that town to connect with the only train leaving Central Oregon on that day, he was served with the summons and complaint in this action. He had no more than a half hour in which to look up his attorney, advise him of the situation and catch the train in order to rejoin his regiment, which he was compelled to do and did.

A demurrer having been filed to the original complaint and an amended complaint, and also a second amended complaint filed, on September 22d defendant demurred to the latter complaint, which demurrer was overruled, and on September 25th, by his counsel, filed an answer. On the same day the cause being called for trial, defendant, through his attorney filed a motion for a postponement thereof, based upon the affidavit of his counsel setting forth the above facts, and also that it was impossible for the defendant to be present at the trial; that he was not a free agent by reason of his military service; that he had not had sufficient, or any, time to prepare his defense or to fully advise or inform his counsel of his evidence; that the evidence consisted of a large number of book accounts, receipts and other documents which could not be identified or explained without first communicating with him, which was then impossible to do; that he owns a large amount of valuable property in Crook County; that it was impossible to obtain a second furlough in order that he might return to the State of Oregon at that time to attend the trial; that plaintiff well knew the

defendant would return to the State of Oregon as soon as the military service was over; that there had not been sufficient, or any, time within which to prepare depositions or to ascertain the necessary information upon which defendant's counsel could prepare such depositions at any time since the complaint was filed, so that defendant would have a fair trial of the matter set out in the complaint, if then compelled to go to trial; that the action of the plaintiff in demanding the trial at that time would tend to hinder and prevent the military forces of the United States from performing their duty.

Several of the parties who assigned their accounts to plaintiff made and filed affidavits tending to show that the accounts as claimed were justly due and unpaid. As to the circumstances of the defendant soldier and the necessity for continuance of the action in order that he might be present or have a sufficient time and opportunity for making his defense, we find no dispute. The court denied the motion for continuance. On September 26, 1916, after hearing the evidence on behalf of the plaintiff, the defendant's counsel declining to offer any testimony, the court directed a verdict in favor of plaintiff for the amount claimed and rendered judgment therefor. Defendant appeals, assigning among other errors the refusal to grant a continuance of the cause.

1, 2. It is the policy of the law to give a party to an action his day in court, or a sufficient opportunity to make any defense claimed by him. Under the circumstances of this case as detailed by affidavit on behalf of the defendant and in regard to which there is practically no controversy, we think the trial court in the exercise of its discretion should have granted a postponement of the trial. Such judicial discretion should be

exercised according to fixed legal principles in order to promote substantial justice: *Linn County* v. *Morris*, 40 Or. 415, 420 (67 Pac. 295). While in the military service of his country and on that account compelled to be absent from the place of trial of a case in which he is a party and at which his presence is necessary for a proper conduct thereof, the defendant has one of the strongest reasons for the continuance of the action. It is shown that the presence of the defendant at the trial was absolutely necessary. Chapter 275 of the Laws of 1917, p. 515, relating to and limiting suits to foreclose mortgages, and levy of execution upon judgments, upon and against lands of soldiers and sailors in the actual service of the United States during war, indicates the legislative trend in regard to such matters.

The judgment of the lower court is reversed and the cause remanded for such further proceedings as may be deemed proper not inconsistent herewith.

REVERSED AND REMANDED.

Submitted on briefs January 22, affirmed February 19, 1918.

TOY *v.* GONG.

(170 Pac. 936.)

Equity—Stay of Proceedings—Appeal on Equitable Issues.

1. Where pending a suit at law equitable defense is interposed and tried, the filing of the cross-bill embodying such defense, by force of Section 390, L. O. L., automatically stays the proceedings at law until judgment is rendered therein, but upon rendition of the judgment the taking of an appeal in the equity suit does not stay the proceedings at law.

Judgment—Res Judicata—Questions Concluded.

2. In an action at law for wages wherein equitable cross-bill setting up partnership was interposed, a decree merely dismissing the

cross-bill must be read with the pleadings, and with the findings of fact and conclusion of law to the effect that no partnership existed, and against the record disclosed an adjudication against the claim of partnership, under Section 759, L. O. L., and such issue could not be again tried in the action at law.

[As to elements necessary to conclusiveness of a judgment in another claim, see note in 8 Am. St. Rep. 229.]

Judgment—Res Judicata—Appeal.

3. In an action at law for wages, where the defense of partnership was interposed, the fact that an appeal on the equitable issues was pending does not prevent the decree appealed from from being available as evidence to support a plea of *res judicata.*

Master and Servant—Action for Wages—Variance—Express Contract of Quantum Meruit.

4. In an action at law for wages, wherein plaintiff was required to elect whether to proceed on the contract price or for the reasonable value of the services, recovery may be had upon *quantum meruit,* although evidence as to the express hiring was introduced; the stipulated price in such case becoming the *quantum meruit.*

From Marion: PERCY R. KELLY, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

Ton Toy filed a complaint on February 19, 1916, alleging that between March 1, 1915, and November 18, 1915, he rendered services as a farm-hand and overseer at the special instance and request of the defendant; and

"that for said services the defendant promised and agreed to pay plaintiff the reasonable salary of seventy-five ($75) dollars per month."

The defendant answered and also filed a complaint in the nature of a cross-bill in equity alleging in substance that Ton Toy and John Gong were partners and that the services for which Ton Toy was attempting to recover a judgment in the action at law had been rendered by Ton Toy as a partner and for the partnership. The cross-bill prayed for an accounting and a dissolution of the partnership. The suit in equity proceeded to trial and on December 30, 1916, resulted in a decree dismissing the suit. John Gong appealed from the de-

cree by serving and filing a notice of appeal on February 21, 1917, and by serving and filing an undertaking on appeal on February 26, 1917. Upon the application of Gong, the time for filing the transcript was extended until May 1, 1917. The appeal resulted in an opinion, rendered July 3, 1917, affirming the decree of the Circuit Court: *Gong* v. *Toy,* 85 Or. 209 (166 Pac. 50).

On April 17, 1917, Gong filed an amended answer in the action at law alleging that Ton Toy and John Gong were partners and that the services rendered by Ton Toy had been performed by him as a member of the partnership and not as an employee of John Gong.

Ton Toy replied to the amended answer on April 21, 1917, and pleaded the decree in the suit in equity as an adjudication of the claim of partnership which John Gong had pleaded as a defense to the complaint. The action at law was tried on April 21, 1917, and terminated in a verdict and judgment for Ton Toy. John Gong appealed from the judgment. AFFIRMED.

For appellant there was a brief submitted over the names of *Messrs. Smith & Shields* and *Mr. Walter C. Winslow.*

For respondent there was a brief prepared and filed over the name of *Messrs. Carson & Brown.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. One of the assignments of error arises out of the refusal of the court to receive in evidence the notice of appeal, the undertaking on appeal, the motion for and the order allowing an extension of time for filing the transcript. The contention of the defendant is that the appeal from the decree stayed further proceedings in the action at law until a final decision by the appel-

late court of the suit in equity. The filing of the cross-bill, by force of Section 390, L. O. L., automatically and without the aid of an injunction by a court stayed the proceedings at law until the Circuit Court rendered a decree in the suit. There is language in *Oatman* v. *Epps,* 15 Or. 437, 439 (15 Pac. 709), which supports the position taken by the appellant, but the language referred to was not necessary to a decision of that case and for that reason may be regarded as *obiter dictum;* and, moreover, the question may now be regarded as removed from the field of debate, for after a careful consideration of the statute, this court speaking through Mr. Justice MOORE in *Donart* v. *Stewart,* 63 Or. 76, 78, 80 (126 Pac. 608), held that:

"The arrest of the proceedings in the action which thus results by operation of law is tantamount to the service of an interlocutory injunction, which, when dissolved by a dismissal of the suit in equity, is not revived by taking an appeal from the decree rendered therein."

Broad statements amounting to generalizations may be found in some precedents which, if literally construed and applied, might seem to incline to the view that an appeal from the decree stays the action, but those cases must be read in the light of the facts which were involved and when so read it will be ascertained that reference is made to the decree in the Circuit Court rather than to a decree in the Supreme Court. Of course as ruled in *Brice* v. *Younger,* 63 Or. 4, 6 (123 Pac. 905), if the Circuit Court permits

"The trial of the law action to proceed pending the appeal, it will be at plaintiff's peril, for if the appellate court shall reverse the appeal and direct that the action be perpetually enjoined, he would be thereby deprived of the benefit of the judgment, if one is obtained, by such decree."

The opinion in *Oregon Surety & Casualty Co.* v. *Paulson,* 73 Or. 163, 166 (144 Pac. 571), and the opinion in *Noyes-Holland Lumber Co.* v. *Pacific Livestock & L. Co.,* 84 Or. 386, 389 (165 Pac. 236), afford illustrations of the recent application of the principle established in *Donart* v. *Stewart,* 63 Or. 76 (126 Pac. 608).

2. Several assignments of error are predicated upon the contention that the decree of the Circuit Court did not preclude John Gong from offering evidence in the action at law to sustain the defense of partnership pleaded by him. All the papers constituting the judgment-roll in the suit in equity, including the cross-bill, answer, findings of fact, conclusions of law and decree were received in evidence. The cross-bill contained an allegation that Ton Toy and John Gong were partners and that the services for which Ton Toy was attempting to recover in the action at law had been performed by him as a partner and for the partnership; and the prayer was for an accounting and a dissolution of the partnership. Ton Toy answered the cross-bill with a general denial. The findings of fact recite a trial and that "after hearing and considering all the evidence offered by the parties" the court finds:

"That there never was a partnership existing between the parties to the above-entitled suit nor any other relation than that of master and servant existing between said parties";

and as a conclusion of law the court found "that defendant is entitled to a decree dismissing the suit." After stating that the trial occurred at a certain date and naming the attorneys who appeared for the respective parties the decree reads thus:

"And the court being fully advised made and filed certain findings of fact and conclusions of law whereby and wherefrom it appears that defendant is entitled to a decree dismissing this suit."

The amended answer upon which the action at law was tried contains a denial of the allegations of the complaint "except as herein alleged." This denial is followed by an allegation that Ton Toy and John Gong were partners and another allegation that the services rendered by Ton Toy were rendered under the partnership agreement.

It is true that the decree merely discloses that the "suit be and the same is hereby dismissed," but it is also true that it recites that the court "filed certain findings of fact and conclusions of law whereby and wherefrom it appears that defendant is entitled to a decree dismissing the suit." The primary issue presented by the pleadings was whether the parties were partners. While the decree does not within itself show what matters were determined it does refer to the findings and by examining the findings it will plainly appear that the court decided that Ton Toy and John Gong were not partners. The pleadings, findings of fact and conclusions of law filed in the suit in equity were competent for the purpose of showing that the question of partnership was actually involved in the decree and actually and necessarily decided: *Gentry* v. *Pacific Livestock Co.*, 45 Or. 233, 238 (77 Pac. 115); *Astoria* v. *Astoria & Columbia River R. Co.*, 67 Or. 538, 549 (136 Pac. 645, 49 L. R. A. (N. S.) 404); 23 Cyc. 1292; 15 R. C. L. 979, 980, 1048, 1049.

The record discloses that the question of the existence of the partnership was actually decided and necessarily included in the decree and the decision of that question was necessary to the decree; and, therefore, the question of whether Ton Toy and John Gong were partners is deemed to have been determined by that decree: Section 759, L. O. L. When the decree was rendered the question of the existence of the part-

nership became *res adjudicata* and John Gong was not entitled again to litigate that question in the action at law: 15 R. C. L. 952, 973, 976; *Dose* v. *Beatie,* 62 Or. 308, 317 (123 Pac. 383, 125 Pac. 277).

The decree of dismissal was not made "without prejudice to another suit by the plaintiff for the same cause or any part thereof," but it was an unqualified decree of dismissal on the merits, and is therefore *res adjudicata:* Section 411, L. O. L.; 9 R. C. L., p. 209, § 30; 15 R. C. L. 983; 23 Cyc. 1231.

3. The appellant contends that the appeal, pending at the time of the trial of the action at law, prevented the decree from being used as evidence of an adjudication of the question of partnership. In many jurisdictions an appeal renders a decree unavailable as evidence to support a plea of *res adjudicata;* but in other jurisdictions a contrary rule prevails: 23 Cyc. 1233. In this state it is the established rule that the force of a decree as a plea or as evidence remains unimpaired until it is reversed or modified, and consequently Ton Toy was entitled to use the decree as evidence to support his plea of former adjudication: *Warner* v. *Myers,* 3 Or. 218, 224; *Day* v. *Holland,* 15 Or. 464 (15 Pac. 855); *Shirley* v. *Birch,* 16 Or. 1, 7 (18 Pac. 344); *Nessley* v. *Ladd,* 30 Or. 564, 567 (48 Pac. 420); *Nickerson* v. *Nickerson,* 34 Or. 1, 2 (48 Pac. 423, 54 Pac. 277); *Porter* v. *Small,* 62 Or. 574, 588 (120 Pac. 393, 124 Pac. 649, Ann. Cas. 1914C, 536, 140 L. R. A. (N. S.) 1197); *Nichols* v. *Ingram,* 75 Or. 439, 447 (146 Pac. 988). Moreover, this court held on the appeal from the decree that John Gong had failed to prove a partnership: *Gong* v. *Toy,* 85 Or. 209 (166 Pac. 50).

4. At the opening of the trial Ton Toy was required on the motion of John Gong "to elect whether or not he would proceed upon the theory of the reasonable

value of services rendered, or upon the contract price"; and the "plaintiff elected to proceed upon the theory of the reasonable value of the services rendered." Four witnesses for the plaintiff testified concerning the reasonable value of the services rendered by Ton Toy. The plaintiff, however, was asked: "How much did he [referring to John Gong] promise to pay you?" and because the witness answered "Seventy-five dollars a month," the defendant contends that the plaintiff cannot recover in this action after having elected to proceed upon the theory of the reasonable value of the services. There was evidence of an express hiring. The work had been completed when the action was brought and nothing remained to be done except to pay for the services performed, and under these circumstances Ton Toy had a right to sue upon a *quantum meruit* and to offer evidence of an express contract fixing the price: *West* v. *Eley,* 39 Or. 461, 465 (65 Pac. 798); *Chamberlain* v. *Townsend,* 72 Or. 207, 213 (142 Pac. 782, 143 Pac. 924); *Schade* v. *Muller,* 75 Or. 225, 232 (146 Pac. 144); *Tharp* v. *Jackson,* 85 Or. 78, 89 (165 Pac. 585, 1173). In *Burgess* v. *Helm,* 24 Nev. 242 (51 Pac. 1025, 1026), cited in *West* v. *Eley,* 39 Or. 461 (65 Pac. 798), the court says:

"Under a complaint on a *quantum meruit* for services, where a specified contract is proved, fixing the price for services, the stipulated price becomes the *quantum meruit* in the case: *Fells* v. *Vestvali,* 41 N. Y. (2 Keyes), 152. If the plaintiff was entitled to recover at all, it was on the ground that the services had actually been rendered; and, after complete performance of an express contract, there is no reason why a recovery may not be had upon a complaint on *quantum meruit* (Id.), when the opposite party to the action has not been misled in the defense."

See also: 5 C. J. 1409, 1411; 2 R. C. L. 743, 762, 773; 40 Cyc. 2824, 2832, 2835.

Reference is made in the briefs to some additional questions but it is sufficient to say that, after examining them, we are of the opinion that the record is free from reversible error; and the judgment is therefore affirmed. AFFIRMED.

Argued November 21, 1917, affirmed January 15, rehearing denied February 26, 1918.

DOUGLAS LAND CO. *v.* CLATSOP COUNTY.

(169 Pac. 790.)

Taxation—Correction of Assessment—Review by Courts — Evidence.

1. On an appeal to the Circuit Court from the refusal of the board of equalization to reduce an assessment of several hundred lots, evidence *held* insufficient to show error on the part of the assessor in valuing the lots.

Taxation—Correction of Assessment—Review by Courts—Burden of Proof.

2. Under Section 3613, L. O. L., as amended by Laws of 1913, page 329, providing that a taxpayer aggrieved by the assessment of his property and denied relief by the board of equalization may appeal to the Circuit Court, the burden is on the property owner on an appeal to the Circuit Court to show error on the part of the assessor.

Taxation—Correction of Assessment—Evidence—Offer to Sell Property.

3. While offers to sell property at stated prices are properly received as admissions against the party making the offers, they are not admissible on his behalf on an appeal to the Circuit Court from the refusal of the board of equalization to reduce an assessment.

Taxation—Correction of Assessment—Review by Court—Extent of Review.

4. On appeal to the Circuit Court from the refusal of the board of equalization to reduce an assessment under Section 3613, L. O. L., as amended by Laws of 1913, page 329, an issue as to the illegality of the assessment because made by deputy assessors cannot be determined, especially where there are no allegations on which to try out the legality of the assessments, and where the only assignment of error on appeal is that the Circuit Court erred in dismissing the petition and in holding that the property described was assessed at its true cash value.

From Clatsop: JAMES A. EAKIN, Judge.

Department 2. Statement by MR. JUSTICE MCCAMANT.

In September, 1915, Douglas Land Company filed a petition with the board of equalization for Clatsop County praying for a reduction in the assessment of its properties for the year 1915. The properties consist of several hundred lots in sixteen platted subdivisions of the county and four hundred and eighty acres of land in township 4 north of range 9 west of the Willamette Meridian. The assessor had appraised the lots in five of these additions at $1 a lot; in four of them at $2; in two of them at $3; in one addition at $4; in another at from $15 to $50 a lot; in still another at $60; in another the assessment varied from $40 to $100; and in the sixteenth addition a fractional interest in two lots owned by petitioner was assessed at the rate of $250 a lot. The acreage was assessed at $4 an acre.

The board of equalization denied the relief prayed for and an appeal was taken to the Circuit Court for Clatsop County. The court also denied the petition and an appeal is prosecuted to this court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. J. F. Hamilton.*

For respondent there was a brief over the names of *Mr. Edward C. Judd* and *Mr. C. W. Mullins,* District Attorney, with an oral argument by *Mr. Judd.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

This is a proceeding brought under the authority of Section 3613, L. O. L., as amended in 1913; see the

Session Laws for that year, pages 329, 330. The salient portion of the statute has been recently quoted by Mr. Justice BEAN in his opinion *In re Weyerhaeuser Land Co.,* 85 Or. 434 (165 Pac. 1164, 1167), and it is not necessary to set it up here. It provides that a taxpayer aggrieved by the assessment of his property and who is denied relief by the board of equalization, may appeal to the Circuit Court. The question to be determined is whether the assessment conforms to the actual cash value of the property. The statute has been twice construed by this court and it is held that the error of the assessor must be made clearly to appear: *Northern Pacific R. Company* v. *Clatsop County,* 74 Or. 250, 256 (145 Pac. 271); *In re Weyerhaeuser Land Co.,* 85 Or. 434 (165 Pac. 1164, 1167). This precept is fatal to the rights asserted by this appeal.

1. Petitioner relies chiefly on the testimony of three real estate brokers and its president, Mr. J. F. Hamilton. One of the real estate men, Ben Ward, was not questioned as to his familiarity with the properties in question. Another of them, A. R. Cyrus, was undertaken to be qualified by the following testimony:

"Q. There are certain properties that the Douglas Land Company claim are over-assessed and the subject of this litigation and what do you know about these properties now, all this property lying back of town, assessed at two, three and four dollars a lot by the Assessor: Columbia Addition, Columbia Second Addition, Dement's Addition, East Astoria and Extension to Railway Addition, Laurel Park Addition, Melrose Addition, North Addition, Powell's Addition and Railway Addition to Astoria, what do you know about all these properties?

"A. Well, I know them in a general way. I have never made a particular examination of these particular additions, only knowing them from their general location, that is all."

The third of these witnesses, W. R. Dement, testified on this subject as follows:

"Q. You know these additions that were laid out in ninety, in the time of the inflation, such as Columbia Addition, Columbia Second Addition, Dement's Addition, East Astoria, and Extension to Railway Addition, Laurel Park Addition and North Addition, and a good many other additions, Pacific Addition, Railway Addition, you know something about where they lie and something about them?

"A. Well, I have a general idea."

The examination of all petitioner's witnesses was of the most general character. It had reference for the most part to the general values of property in the parts of the county where the respective subdivisions are located. Some of petitioner's evidence bore on the condition and value of the several additions in which the property in question is situate, but except in one or two cases petitioner did not produce witnesses who were familiar with the lots and blocks specifically described in its petition and who could advise the court as to their value. Without a showing of familiarity with the property involved but little value can be attached to the testimony of any witness and the testimony of Ward, Cyrus and Dement cannot be given much weight.

2. Mr. Hamilton did state generally that he knew the properties involved and that they were not worth more than the values admitted in the petition. This is the opinion of an interested witness and unless it is strongly corroborated it is insufficient to overcome the presumption of accuracy attaching to the assessment. Petitioner made a better showing in attacking the assessment of lots in Addition of Silver Point Cliff than in the remainder of its case. The testimony shows that some of the lots in this addition have only

a nominal value. They are assessed at from $15 to $50 a lot. The testimony shows that the lots in this subdivision differ greatly in value and there is no way by which we can distinguish those of substantial value from those of nominal value. The burden is on petitioner and it must fail because its testimony lacks the definiteness required to show the error of the assessor.

3. Petitioner offered in evidence certain contracts made by it with real estate brokers for the sale of the properties involved at stated prices. The defendant reserved an objection to this evidence and the objection is well taken. *Wichita Falls Co.* v. *Holloman,* 28 Okl. 419 (114 Pac. 700, 25 Ann. Cas. 1912D, 287), cited by petitioner, holds that offers to sell at stated prices are properly received as admissions against the party making the offers. On familiar principles these offers are not admissible on behalf of the party making them. The defendant proved that within two or three years a number of sales had been made of lots in the additions in question at prices equal to or in excess of the assessed valuations of petitioner's property.

It would unduly prolong this opinion to set out the evidence bearing on the value of each of the tracts in which petitioner's property is located. We have carefully read and considered the testimony and think that in no case does the petitioner clearly show that the assessment is in error to petitioner's disadvantage.

4. It appears that some of the assessments in question were made by deputy assessors. We are cited to 37 Cyc. 980 in support of the contention that the assessor must individually assess all property on the roll and that an assessment made by a deputy assessor is invalid. This rule would make it impossible to assess property in some of the more important counties of

the state, as it is beyond the power of any man to investigate each year every piece of property in these counties and appraise it for assessment purposes. However, this proceeding is not appropriate to the determination of such a question. Petitioner's only assignment of error is "that the Circuit Court erred in rendering said decree and in holding that the property described in the petition was assessed at its true cash value." There are no allegations on which to try out the legality of these assessments made by deputies, nor can such an issue be determined in this kind of a proceeding.

We find no error and the decree is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued January 9, reversed January 29, rehearing denied February 26, 1918.

PROVO v. SPOKANE, P. & S. RY. CO.*

(170 Pac. 522.)

Railroads—Injuries to Person—Climbing Between Cars—Discovered Peril.

1. Evidence *held* sufficient to support a finding that defendant railroad knew that plaintiff was climbing through between freight-cars when it was starting the train, and could have avoided the injury.

Railroads—Starting of Train—Discovered Peril—Knowledge of Employee.

2. Where plaintiff was climbing between freight-cars, and was injured by the first start of the train, to recover for discovered peril, it is necessary that the engineer, fireman, or the brakeman giving the signal to start knew of his perilous position; it not being sufficient

*For authorities discussing the question of liability of railroad company for act of employee in inviting pedestrian to cross train obstructing highway, see notes in 13 L. R. A. (N. S.) 1071; 34 L. R. A. (N. S.) 469. REPORTER.

that some other brakeman or employee knew of his being between the cars.

Railroads—Injuries to Person Between Cars—Misleading Instructions.

3. Where plaintiff was injured between freight-cars by first movement of starting train, an instruction that if employees in charge of the freight "or" engaged in assisting in directing its movement knew of his peril, to find for plaintiff was misleading, because of the word "or," as the jury might have applied the doctrine of discovered peril if any trainman knew of plaintiff's position.

[As to passing over, under or between cars obstructing crossing as negligence, see note in **Ann. Cas.** 1912B, 687.]

Trial—Instructions—Curing Error.

4. Where an instruction which would have permitted recovery for discovered peril for injuries incurred by the first movement of a train in starting if any of the trainmen knew of his peril was repeated twice, and several other instructions required unqualifiedly that recovery be had if defendant had knowledge of his peril, such instruction was not cured by a proper instruction in the charge, especially where the evidence would warrant a finding that an employee not starting or signaling the train to start was the only one knowing of plaintiff's peril.

Appeal and Error—Matters Reviewable—Instructions—Exceptions.

5. A general exception is sufficient to reserve a contention that an instruction is misleading as applied to the facts proved by the evidence.

Appeal and Error—Curing of Error—Evidence—Bill of Exceptions.

6. Where bill of exceptions does not contain all the evidence, but "is certified to contain * * evidence necessary for the presentation of the exceptions," and it affirmatively appears that there is error, the presumption is that the error was not cured, and was harmful.

From Clatsop: JAMES A. EAKIN, Judge.

Action by Charles Franklin Provo against the Spokane, Portland & Seattle Railway Company, a corporation, to recover damages for a personal injury. From a verdict and the consequent judgment in favor of plaintiff, defendant appealed. Reversed and new trial ordered.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action brought to recover damages for a personal injury sustained by plaintiff August 26, 1916. On the day in question plaintiff was on the dock of the Great Northern Pacific Steamship Company at Flavel.

He desired to take one of the defendant's trains bound for Astoria. A freight train consisting of twenty-six cars was on one of the defendant's tracks between the dock and the track on which the passenger train was approaching. Plaintiff alleged and testified that one of the brakemen in charge of the freight train instructed him to cross between two freight-cars; that while plaintiff was so crossing, the defendant with full knowledge of plaintiff's perilous situation started the freight train, causing the injuries of which plaintiff complains. The defendant's witnesses denied that any invitation was given plaintiff or that they had any knowledge of his whereabouts when the train started. The defendant set up contributory negligence as an affirmative defense. The jury found for plaintiff and defendant appeals from a judgment entered on this verdict. REVERSED. NEW TRIAL ORDERED.

For appellant there was a brief over the names of *Mr. Charles A. Hart* and *Messrs. Carey & Kerr,* with an oral argument by *Mr. Hart.*

For respondent there was a brief over the name of *Messrs. Norblad & Hesse,* with an oral argument by *Mr. Frank C. Hesse.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. Defendant assigns error on the giving of the following instruction:

"That, if you find from the evidence in this case that plaintiff was guilty of negligence in crawling or climbing or attempting to crawl or climb through the defendant's said freight train and between two box-cars thereof and in assuming and placing himself in the position as he did, but that his negligence had come

to an end, nevertheless, if you further find from the evidence in this case that the defendant or its officers, agents, servants or employees, in charge of said freight train or engaged in, assisting in, and directing the moving and switching thereof, actually knew of plaintiff's said presence between said two box-cars or had actual notice and knowledge of his apparent perilous position which he had assumed or in which he had placed himself, and if you further find from the evidence in this case that the defendant had ample time and opportunity to avoid injuring this plaintiff by either giving notice or warning him that said train was about to be moved, backed or set in motion, or by having said train remain in a stationary position until plaintiff had extracted himself from between said cars and from his said perilous position, then, I charge you it was defendant's duty to exercise a reasonable amount of care towards this plaintiff and to make use of all reasonable means to prevent injuring this plaintiff."

It is argued that the evidence lays no foundation for the doctrine of discovered peril and that it was error to submit the question to the jury. Plaintiff testified that the brakeman who had invited him to cross the freight train was looking right down at him when the invitation was given; that plaintiff started through and as he stepped on the coupling the train backed up and caught his foot. It is inferable from the testimony that the invitation was acted on without delay; plaintiff testified that the brakeman told him to hurry. The jury was entitled to find from this evidence that the brakeman saw plaintiff as he stepped between the cars: *Lowden* v. *Pennsylvania Co.*, 41 Ind. App. 614 (82 N. E. 941); *Chicago & E. I. Ry. Co.* v. *Hedges*, 118 Ind. 5 (20 N. E. 530, 533); *Henderson* v. *St. Paul etc. R. Co.*, 52 Minn. 479 (55 N. W. 53, 54); *Irvin* v. *Gulf etc. Ry. Co.* (Tex. Civ. App.), 42 S. W.

661, 664. The testimony of the defendant established that R. R. Hinds was the only brakeman on that part of the train which plaintiff endeavored to cross. The engineer testified that the train was started on a signal given him by Hinds. The foregoing evidence was sufficient to take the case to the jury on the question of whether the defendant could have avoided the injury by the exercise of due care after it became aware of the perilous position of plaintiff: *Smith* v. *Southern Pacific Co.*, 58 Or. 22, 36 (113 Pac. 41, Ann. Cas. 1913A, 434); *Plinkiewisch* v. *Portland Ry., L. & P. Co.*, 58 Or. 499, 503 (115 Pac. 151); *Richardson* v. *Portland Ry., L. & P. Co.*, 70 Or. 330, 336 (141 Pac. 749); *Twitchell* v. *Thompson*, 78 Or. 285, 290, 291 (153 Pac. 45).

2. It is the teaching of the cases last cited that the doctrine of discovered peril is applicable only where defendant has actual knowledge of plaintiff's perilous position. Applying this principle to the facts of the instant case, plaintiff is not entitled to recover on this ground without showing that the engineer or fireman who started the train, or the conductor or brakeman who gave the signal to start, was advised of the position of plaintiff at the time when the signal was given or when the train started: *Andrews* v. *Central Railroad & Banking Co.*, 86 Ga. 192 (12 S. E. 213, 10 L. R. A. 58). The defendant has many agents and employees. It would be manifestly unjust to charge it with the duties arising under the doctrine of discovered peril because some agent or employee of the defendant knew of plaintiff's position between the cars, unless such agent or employee participated in the movement of the train which caused plaintiff's injury. Plaintiff testified that he was injured on the first movement of the train. We are therefore not concerned in

this case with the question of whether the train could have been stopped in time to prevent the injury of plaintiff, after his presence between the cars became known to those who were moving the train.

The general rule is that plaintiff's contributory negligence is a bar to his right of recovery. The doctrine we are discussing is an exception to that rule grounded on the humane principle that it is the duty of every man to avoid injuring another when he can do so by the exercise of due care, even though that other has been at fault in putting himself in a position of peril. In this jurisdiction it is firmly established that this principle is applicable only where the party in control of the instrument which caused the injury was aware of plaintiff's peril at a time when it was within his power to avert the injury.

3. The instruction quoted above is not to be harmonized with the foregoing principles. The jury was permitted to apply the doctrine of discovered peril if it found that the position of plaintiff was known to agents or employees of the defendant other than those who moved the train. The language of the instruction was in part:

"If you further find * * that the defendant *or* its officers, agents, servants or employees in charge of said freight train *or* engaged in, assisting in and directing the moving and switching thereof, actually knew of plaintiff's said presence * * ."

The use of the disjunctive "or" was misleading to the jury. The instruction required the jury to apply the doctrine of discovered peril, and so to exonerate the plaintiff from the blame of his own negligence, if actual knowledge of his dangerous situation was brought home, not merely to any of the men in charge of that train, but also to any other of defendant's

employees whatever his station or duty whose knowledge was imputable to the company. If the train had not moved plaintiff would not have been hurt. The imminence of his peril was due to the position he had assumed and the movement of the train while he was in that position. The instruction directed the jury to apply the doctrine of discovered peril if any trainman knew of the position of plaintiff, even though such trainman did not know that the train was to move immediately and did not participate in moving it. The case is to be distinguished from those numerous cases wherein the train was in motion when plaintiff assumed a position of danger. In these latter cases the defendant is properly chargeable with the knowledge of all its agents who have power to stop the train. In this case the first movement of the train caused the injury. There was ample evidence to justify the jury in finding plaintiff guilty of contributory negligence. In order that plaintiff could recover, if he were found to have contributed to his own injury, it was necessary for him to show that one or more of the particular employees who moved the train were aware of his perilous position at the time the train moved.

4. It is true, as contended by plaintiff, that instructions are to be read *in pari materia* and a reversal will not be ordered if the instructions as a whole fairly submit the issue to the jury, even though the language of the court be inaccurate in a single instruction: *Wellman* v. *Oregon Short Line etc. Ry. Co.,* 21 Or. 530, 539 (28 Pac. 625); *Matlock* v. *Wheeler,* 29 Or. 64 (40 Pac. 5, 43 Pac. 867); *Farmers' Bank* v. *Woodell,* 38 Or. 294, 306 (61 Pac. 837, 65 Pac. 520); *State* v. *Mizis,* 48 Or. 165, 181 (85 Pac. 611, 86 Pac. 361); *State* v. *Megorden,* 49 Or. 259, 269 (88 Pac. 306, 14 Ann.

Cas. 130); *Blue* v. *Portland Ry., L. & P. Co.*, 60 Or. 122, 131–133 (117 Pac. 1094); *Thornton* v. *Portland Ry., L. & P. Co.*, 63 Or. 478, 486 (128 Pac. 850); *Astoria Southern R. Co.* v. *Pacific Surety Co.*, 68 Or. 569, 586, 587 (137 Pac. 857).

Testing the above instruction by this rule, we are unable to see that the error was cured. It is true that the court instructed the jury as follows:

"If, however, the men in charge of operating the train were aware of the fact that someone was climbing under or through the train and was in a position to receive injury if the train was started, it would be the duty of such employees to see that such person was out of danger before starting the train."

This was correct as far as it went. But the court followed it with the instruction above quoted and the objectionable part of the instruction was repeated twice. In two other portions of the charge the jury was instructed without qualification to apply the doctrine of discovered peril if the defendant knew of the dangerous situation of plaintiff.

The evidence strengthens the presumption that the jury was misled. It appears that Mr. Kelly, defendant's agent at Flavel, was on a freight-car on the same part of the train as Brakeman Hinds. Mr. Hinds was present in court at the trial; plaintiff and the witness who corroborated his testimony were unable to identify Hinds as the man who gave the invitation. Kelly was not called as a witness, but Hinds testified that he (Hinds) had no knowledge of plaintiff's presence until after the accident. The jury may have believed this testimony and assumed that Kelly was the man who looked at plaintiff when he went between the cars. There is no evidence that Kelly participated in the movement of the train, yet the jury was in-

structed to treat Kelly's knowledge as equivalent to that of the defendant. It appeared that Kelly had authority to direct the moving and switching of trains at defendant's Flavel terminal.

The presumption that the jury was misled is strengthened by a further circumstance. There was evidence that R. R. Robinson, defendant's section foreman, saw plaintiff between the cars. The court instructed the jury that Robinson's knowledge would not charge the defendant with knowledge. No such instruction was given as to Kelly. The jury may well have found for plaintiff on the untenable ground that Kelly's knowledge was knowledge of the defendant within the doctrine of discovered peril. This we believe to be error.

5. Plaintiff contends that this question is not available to defendant for the reason that its exception was a general one. Plaintiff cites *Kearney* v. *Snodgrass,* 12 Or. 311, 317 (7 Pac. 309). This case is distinguished by Mr. Justice BEAN in *Nickum* v. *Gaston,* 24 Or. 380, 391 (33 Pac. 671, 35 Pac. 31). It is there held that a general exception is sufficient to reserve a contention that the instruction is erroneous or misleading as applied to the facts proved by the evidence. The instruction which we have quoted is objectionable on this ground.

6. The bill of exceptions does not purport to contain all of the evidence, but it "is certified to contain a full and correct record of the evidence necessary for the presentation of the exceptions" noted therein and urged in this court. As it appears affirmatively that there is error, the presumption is that the error was not cured and was harmful: *Du Bois* v. *Perkins,* 21 Or. 189, 191 (27 Pac. 1044); *Nickum* v. *Gaston,* 24 Or. 380,

392 (33 Pac. 671, 35 Pac. 31); *Lintner* v. *Wiles*, 70 Or. 350, 358 (141 Pac. 871).

The judgment is reversed and a new trial ordered.

REHEARING DENIED.

REVERSED. NEW TRIAL ORDERED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued February 8, affirmed February 26, 1918.

ARCHAMBEAU *v.* EDMUNSON.

(171 Pac. 186.)

Trial—Special Interrogatories—Defects.

1. Objections to the form of special interrogatories submitted are waived where, prior to submission, they were not called to the court's attention.

Trial—Special Interrogatories—Objections.

2. A special interrogatory should not submit to the jury a question calling for a conclusion of law, and, in order to sanction judgment, a special verdict should contain statements of ultimate facts.

Deeds—Delivery—Question of Fact.

3. Where there is any controversy upon the subject the delivery of a deed or instrument of such nature is a question of fact.

Trial—Special Interrogatories—Objections—Waiver.

4. Where the court's attention was not called to any defect of form, a special interrogatory submitting to the jury the question whether a contract for the sale of land was delivered is not open to objection on the ground that it called for determination of the ultimate fact of delivery instead of the evidentiary facts from which that fact was to be deduced.

Evidence—Admissions—Admissions in Open Court.

5. In an action for damages for breach of contract to convey land, where plaintiff's counsel in open court stated that if the contract was not delivered plaintiff would only be entitled to recover sums paid, such statement is an admission binding on plaintiff, and a verdict for a greater sum cannot be sustained where the jury found that the contract had not been delivered.

[As to silence of attorney, when opposing attorney during trial states matters of fact admitted by adverse party, as admission of such matters, see note in Ann. Cas. 1913E, 945.]

Trial—Special Findings—Conflicts.

6. Under Section 155, L. O. L., special findings by the jury will, where conflicting with the general verdict, control.

Appeal and Error—Review—Questions Presented.

7. While under Section 548, L. O. L., an order setting aside judgment is deemed a final judgment for the purpose of review, yet as there is no determination on the merits, the propriety of a ruling that counterclaims and defenses interposed by certain of the defendants were sufficient cannot be reviewed.

Trial—Instructions—"Execution of Writing."

8. In an action for damages for breach of a contract to convey land, an instruction that before the contract could be binding on defendants there must be an execution and delivery, and if there was no delivery or if there was an unauthorized delivery there could be no recovery, is, under section 777, L. O. L., declaring that the execution of a writing is the subscribing and delivering, erroneous; there being no attempt in the instructions to define or explain what in law constitutes the delivery of a writing.

New Trial—Authority of Court—Error of Law.

9. Under Article VII, Section 3, of the Constitution, as amended, declaring that in actions at law where the value in controversy shall exceed $20 the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court unless the court can affirmatively say there is no evidence to support the verdict, the trial court has authority on its own motion to grant a new trial on account of errors in instructions submitting the cause to the jury, even though no exception was taken.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This was an action to recover damages for the alleged breach of an agreement. The complaint, as far as deemed material herein, substantially charges that on September ——, 1912, a written contract was subscribed by the parties whereby the defendants, in consideration of the payment of $150 an acre, stipulated to sell and convey to the plaintiff a sand and gravel bar in the Willamette River on the Blighton farm in Lane County, Oregon, and within a designated time they would procure a survey of the land and deposit with a specified bank an abstract showing a marketable title to the tract and a deed convey-

ing it to the plaintiff; that pursuant to the terms of the agreement he took possession of the land, made valuable improvements thereon, and paid $400 on account of the purchase price; that the written contract was subsequently modified so that plaintiff agreed to pay $175 an acre for the premises; that without his consent the defendants sold and conveyed to a third person a part of the tract which they had stipulated to grant to the plaintiff, to his damages, etc.

The answer denies the material averments of the complaint and for a further defense so far as considered important, alleges in effect that no written agreement had ever been consummated by the parties; that the defendants had fully performed all the terms of an oral agreement to sell and convey the land, causing the premises to be surveyed and tendered a deed therefor to the plaintiff from whom they demanded the remainder of the consideration, but he refused to comply therewith. For another defense and by way of counterclaim the answer charges that the plaintiff hauled away from the bar sand and gravel of a specified value, and upon demand for the payment thereof he refused to adjust the matter to the defendants' damage.

A reply put in issue the allegations of new matter in the answer. At the trial of the cause testimony was received on the part of the defendants tending to show that a writing was subscribed by them and left with their attorney from whom, without their consent, an agent of the plaintiff obtained the document for the represented purpose of making a copy, and thereupon delivered the paper to his principal who signed it. When all the testimony had been received, the Court addressing plaintiff's counsel inquired:

"If the jury should find that this contract was never delivered to the plaintiff, then do you concede that

your case would fail?" The counsel replied: "No, sir, I do not."

The Court: "Suppose that the jury should find that this contract was never consummated,—never delivered?" Counsel: "Even in that event, we would be entitled to our money back on the ground that the violation of the contract was willful."

The Court: "You would not contend that you would be entitled to any more than your money back?" Counsel: "If they found that no contract was delivered, all we would be entitled to would be upon the basis of a rescission. Our money back."

The Court: "That is one of the special questions that I am going to submit to the jury."

Thereupon written interrogations, without objection or exception, were propounded by the court to the jury, who answered them as follows:

"Question No. 1. Was the written contract, 'Exhibit A' delivered by the defendant to the plaintiff? Answer. No.

"Question No. 2. Did the defendants offer to convey to the plaintiff all the land which they agreed to convey? Answer. No.

"Question No. 3. How much, if any, is the plaintiff entitled to as general damages? Answer: $1,600.

"Question No. 4. How much, if any, are the defendants entitled to recover on account of sand and gravel removed from the premises? Answer. Nothing."

A general verdict was also returned in plaintiff's favor for $1,600 and a judgment was entered therefor. The defendants' counsel then moved to set aside such determination and for a judgment in favor of their clients on the ground that the general verdict was inconsistent with the special findings, which motion was granted. Thereupon the court, upon its own motion, deeming that its charge to the jury, which was not challenged in any manner, was not sufficiently specific in respect to the alleged delivery of the written con-

tract, set aside the latter judgment and granted a new trial, from which order the defendants appealed. Thereafter the plaintiff also took a cross-appeal from the order setting aside the first judgment.

AFFIRMED.

For appellants there was a brief over the names of *Mr. Charles A. Hardy* and *Messrs. Williams & Bean,* with oral arguments by *Mr. Hardy* and *Mr. John M. Williams.*

For respondent there was a brief over the names of *Mr. Fred E. Smith, Mr. C. M. Kissinger, Mr. J. H. Bower* and *Mr. W. G. Martin,* with oral arguments by *Mr. Smith* and *Mr. Kissinger.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. Considering these appeals in reverse order, it is contended by plaintiff's counsel that an error was committed in submitting to the jury the first interrogatory which it is asserted involved an issue of law that should have been determined by the court, and that though the written contract may not have been actually delivered, the inquiry took from the jury a consideration of the question as to whether or not the alleged agreement was acted upon by the parties and thereby ratified so as to become a binding obligation, and for these reasons the first judgment was improperly set aside. A text-writer, referring to such interrogatories remarks:

"If the questions asked are defective, the court's attention should be called to the fact before they are submitted, otherwise they will not be closely criticised on appeal. But if questions are omitted which a party thinks should be submitted, he cannot raise the question by objecting to the submission of the draft. His

remedy is by submitting an additional draft containing the facts on which he desires findings'': Clementson, Special Verdicts, p. 69. This author further observes: ''Objections to form must be made at the time of submission, otherwise it will be presumed that there was assent to the submission of questions as drawn by the court'': Id. 193.

As no objections to the interrogatories submitted were interposed, nor additional drafts suggested, so as to call to the court's attention the facts now urged in respect to a possible ratification of the terms of the alleged contract, all questions relating to that subject were thereby waived.

2–4. In support of the assertion that the first interrogatory involved a question of law, reliance is had upon the case of *White* v. *White,* 34 Or. 141, 158 (50 Pac 801, 55 Pac. 645), where over objection, an issue was submitted requiring a special verdict as to the delivery of a deed, and it was held that the investigation demanded, properly related to a probative fact upon which the rights of the parties depended and was determinative of the case, and that the interrogatory did not refer to mere evidentiary facts, which might afford only *prima facie* proof of some other fact. In that case the inquiry submitted, omitting names, was in effect: Did the deceased in his lifetime voluntarily place the deed in question in possession and control of the defendant, the grantee named in the sealed instrument? An objection was interposed to the question on the ground that it was inconclusive, immaterial and misleading. The jury answered the inquiry in the affirmative.

When there is any controversy upon the subject, the delivery of a deed is always a question of fact: 2 Jones, Real Prop., § 1220. In *Flint* v. *Phipps,* 16 Or. 437, 439 (19 Pac. 543), Mr. Justice STRAHAN in speak-

ing of a deed remarks: "The question of delivery is purely a question of fact." In *State* v. *Leonard,* 73 Or. 451, 483 (144 Pac. 113, 681), Mr. Justice RAMSEY in referring to this subject observes:

"The question of delivery is always a question of fact for the jury where there is any conflict in the evidence in relation thereto."

A text-writer, discussing this matter, says:

"Some courts have stated broadly that delivery is a question of fact. Taken literally, however, this declaration is, perhaps, too sweeping, as ignoring the occasional instances in which the undisputed facts establish delivery as a matter of law. And strictly speaking the question is rather one of mixed law and fact, for from the detail of facts established the legal conclusion must be drawn, though, since the jury usually must find a delivery or not, or else the circumstances from which the court may draw its conclusions, the question may properly be denominated, as has been done in a number of cases, largely one of fact, being so much so, indeed, that the decision of the lower court is conclusive unless the specific facts found conclusively establish the contrary": 8 R. C. L. 976.

The rule established sustains the statement that an interrogatory should not be submitted to the jury which calls for a conclusion of law (38 Cyc. 1912, 1917), and in order to sanction a judgment rendered thereon, special verdicts must contain statements of ultimate facts: Id. 1921. As no objection was interposed to the form of the inquiry, an answer to which required a consideration and determination on the part of the jury of the ultimate fact relating to the delivery of the written contract and not the mere evidentiary facts from which the fact, incapable of further analysis, was to be deduced, no error was committed in the respect alleged.

5. It is insisted by plaintiff's counsel that the second interrogatory assumes that the defendants agreed to convey the land to the plaintiff, and that this inquiry is so inconsistent with the first, that an error was committed in setting aside the original judgment. From the colloquy between the court and plaintiff's counsel, as hereinbefore set forth, the issue seems to have been narrowed to a consideration of the question as to whether or not the defendants delivered to his client the written contract, and if no surrender thereof had been made then the plaintiff's recovery was limited to $400, the amount paid on account of the alleged purchase, from an acceptance of which sum an oral agreement to sell and convey the land might reasonably be inferred, and this being so, a breach thereof required a return of the money thus received. This is the construction which the trial court seems to have given to the second interrogatory, the language of which is not inconsistent with the first.

It is argued by plaintiff's counsel that the jury unmistakably intended to award his client a recovery of $1,600, and hence the judgment originally rendered therefor was erroneously set aside. The answers to the first and third interrogatories are inconsistent when viewed in the light of the questions propounded by the court to plaintiff's counsel and his replies thereto. Since he thus solemnly asserted in open court that only $400 could legally be recovered, in case the jury should find the written contract was never delivered, that declaration should be binding.

6. When special findings made by the jury are inconsistent with the general verdict, the findings are controlling: Section 155, L. O. L.; *Rolfes* v. *Russel*, 5 Or. 400; *Loewenberg* v. *Rosenthal*, 18 Or. 178 (22 Pac. 601); *Leavitt* v. *Shook*, 47 Or. 239 (83 Pac. 391); *Palmer* v. *Portland Ry., L. & P. Co.*, 62 Or. 539 (125

Pac. 840); *Parker* v. *C. A. Smith Lumber & Mfg. Co.*, 70 Or. 41 (138 Pac. 1061); *Herrlin* v. *Brown & McCabe*, 71 Or. 470 (142 Pac. 772). In consequence of the inconsistency in the answers to the interrogatories mentioned, the judgment based upon the general verdict was properly set aside, instead of disregarding the answer to the first question returned by the jury and rendering judgment on the general verdict.

7. Exceptions were taken by plaintiff's counsel to the court's ruling that a counterclaim, interposed as a defense to the maintenance of the action, was sufficient and in sustaining the contention of the defendants, H. L. Edmunson, Millie Blighton and R. A. Maltzan that each signed the writing intended as a contract in order to release an inchoate right of curtesy or of dower in and to the premises described in the complaint, and that neither of them was liable for a breach of the agreement. It will be remembered that the cross-appeal was taken from the order setting aside the first judgment. Such direction of a court is deemed to be a judgment or decree for the purpose of being reviewed: Section 548, L. O. L. The only question presented by an appeal from an order setting aside a judgment is the action of the court in that respect, and as no final determination upon the merits of the cause then remains, any other ruling in relation to the issues must necessarily be held in abeyance until a judgment thereon has been regularly rendered. The alleged assignments of error in these particulars will, therefore, not be considered.

8, 9. The defendants' counsel contend that since no objections were made or exceptions taken to any part of the charge to the jury, the court erred in setting aside the judgment ultimately rendered in favor of their clients and in granting a new trial. It will be remembered that the trial court, deeming its unchal-

lenged instructions in respect to an alleged delivery of the written contract were insufficient properly to enable the jury to understand the rules of law governing the surrender of the possession of a writing, set aside the second judgment and granted a new trial upon its own initiative. The jury were charged *inter alia* as follows:

"Before this written contract can be binding upon the defendants, there must be an execution and delivery of the contract. If you find there was not a delivery of the contract, or if you find it was an unauthorized delivery of the contract, then I instruct you that the plaintiff would not be entitled to recover, and it would be your duty to return into court a verdict for the defendants."

From the language thus employed it will be seen that a distinction was made between the terms "execution" and "delivery," while our statute declares,

"The execution of a writing is the subscribing and delivering it, with or without affixing a seal": Section 777, L. O. L.

The execution of a document therefore necessarily includes its delivery. The instructions do not attempt to define or explain in any manner what in law constitutes the delivery of a writing, which surrender of possession has been held to mean any act, word or conduct from which may reasonably be inferred an express or implied assent on the part of one party to the document that it should irrevocably pass beyond his control, and then or subsequently to be ultimately possessed by the other party to the instrument: *Fain* v. *Smith,* 14 Or. 82 (12 Pac. 365, 58 Am. Rep. 281); *Shirley* v. *Burch,* 16 Or. 83 (18 Pac. 351, 8 Am. St. Rep. 273); *Allen* v. *Ayer,* 26 Or. 589 (39 Pac. 1); *Hoffmire* v. *Martin,* 29 Or. 240 (45 Pac. 754); *Tyler* v. *Cate,* 29 Or. 515 (45 Pac. 800); *Payne* v. *Hallgarth,* 33 Or. 430

(54 Pac. 162); *Swank* v. *Swank,* 37 Or. 439 (61 Pac. 846); *Pierson* v. *Fisher,* 48 Or. 223 (85 Pac. 621); *Burns* v. *Kennedy,* 49 Or. 588 (90 Pac. 1102); *Reeder* v. *Reeder,* 50 Or. 204 (91 Pac. 1075); *Foote* v. *Lichty,* 60 Or. 542 (120 Pac. 398); *Thrush* v. *Thrush,* 63 Or. 143 (125 Pac. 267, 126 Pac. 994).

The rule formerly obtained in Oregon that the granting or denial of a motion for a new trial was a matter resting within the discretion of the trial court, whose action upon the application would not be disturbed upon appeal, except in case of a manifest abuse of what should have been an exercise of sound judgment. Article VII, Section 3, of the organic law of this state, as amended, declares:

"In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict": Gen. Laws Or. 1911, p. 7.

Since that amendment became operative it has been held that the granting of a new trial was not a matter of discretion; that an order for the rehearing of a cause could not be sanctioned except when the court had committed some error, which if properly excepted to or seasonably called to the attention of the court and the motion denied, would have been sufficient cause for a reversal of the judgment if it had been brought up for review; and that under such circumstances the trial court upon motion or *sua sponte* possessed adequate power and was authorized within the prescribed time, to correct the error which it had committed by granting a new trial: *De Vall* v. *De Vall,* 60 Or. 493 (118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A, 409, 40 L. R. A. (N. S.) 291); *Taylor* v. *Taylor,* 61 Or.

257 (121 Pac. 431, 964); *Sullivan* v. *Wakefield,* 65 Or. 528 (133 Pac. 641); *Smith & Bros. Typewriter Co.* v. *McGeorge,* 72 Or. 523 (143 Pac. 905); *Rudolph* v. *Portland Ry., L. & P. Co.,* 72 Or. 560 (144 Pac. 93); *Frederick & Nelson* v. *Bard,* 74 Or. 457 (145 Pac. 669); *McGinnis* v. *Studebaker Corp.,* 75 Or. 519 (146 Pac. 825, 147 Pac. 525, Ann. Cas. 1917B, 1190, L. R. A. 1916B, 868); *Delovage* v. *Old Oregon Creamery Co.,* 76 Or. 430 (147 Pac. 392, 149 Pac. 317); *Pullen* v. *Eugene,* 77 Or. 320 (146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474); *Brewster* v. *Springer,* 79 Or. 88 (154 Pac. 418); *Wakefield* v. *Supple,* 82 Or. 595 (160 Pac. 376); *Speer* v. *Smith,* 83 Or. 571 (163 Pac. 979).

The rule thus established ought in our opinion to be enlarged so that, when by reason of some misapplication of the principles of law to which no exception has been taken, or in consequence of some inadvertence to which attention has not been called, if the court is satisfied that a party has not had his cause properly presented, justice which should be dispensed in all cases sanctions the setting aside of a judgment rendered upon a verdict and the granting of a new trial, when such action of the lower court does not violate Article VII, Section 3, of the Constitution of Oregon respecting the *quantum* of evidence.

In this instance, the action of the court in granting a new trial in consequence of its failure properly to instruct the jury in relation to the delivery of the alleged written contract, brings this case within the rule last announced, and this being so the orders appealed from are affirmed. AFFIRMED.

McBRIDE, C. J., McCAMANT and BENSON, JJ., concur.

Argued November 16, reversed and remanded with directions November 27, 1917, rehearing denied February 26, 1918.

GREAT WESTERN LAND CO. *v.* WAITE.*

(168 Pac. 927; 171 Pac. 193.)

Evidence—Employment of Broker—Secondary Evidence—Statute.

1. The provision as to secondary evidence in Section 808, L. O. L., excluding all evidence of an agreement employing a broker to sell real estate, other than the writing or secondary evidence of its contents, refers to cases where the writing is lost or is in the possession of the adverse party, who refuses to produce it on proper notice.

[As to supplementing brokerage contract by proof of collateral oral agreement, see note in **Ann. Cas. 1914A, 458.**]

Brokers—Contract of Employment—Statute of Frauds.

2. Letter from defendant, in reply to some letter, stating that if plaintiff has a customer for defendant's land, he will make a price of $15 an acre net to defendant, reply from plaintiff, stating it will endeavor to make as much profit as possible, and will expect defendant to protect it in the matter of difference between net price and the quotation to be made to purchaser, and letters from defendant agreeing to protect plaintiff in such matter, are insufficient as a contract of employment of broker to sell real estate, within Section 808, L. O. L., declaring such a contract void, unless there be a written memorandum thereof, subscribed by the parties, expressing the consideration, and excluding all evidence of the agreement other than the writing or secondary evidence of its contents; there being no words of employment, and it being necessary that the papers establish the hiring and the consideration for it.

Brokers—Contract of Employment—Statute of Frauds.

3. Correspondence *held* not to show a contract of employment of plaintiff by defendant as his broker to sell land, within Section 808, L. O. L., requiring a written memorandum of such contract, expressing the consideration.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

After stating its corporate existence and the defendant's ownership of certain lands in Douglas County, the plaintiff alleges:

*On necessity that authority of agent to purchase or sell real property be in writing to enable him to recover compensation for his services, see notes in **44 L. R. A. 601**, and **9 L. R. A. (N. S.) 933**.

REPORTER.

"That prior to the said 24th day of February, 1914, the defendant hired plaintiff as his real estate broker and agent to find and cause to be found for him a purchaser for said tract of land, and then and there agreed and contracted with plaintiff to pay to it, when it should find or cause to be found such purchaser for said land, a commission and compensation of $1.50 (One and fifty one-hundredths Dollars) per acre, amounting in all to Five Thousand Three Hundred Thirteen ($5313.00) Dollars."

The remainder of the pleading is to the effect that the plaintiff found a purchaser to whom the defendant sold the land, and that he has not paid the commission mentioned, nor any part thereof.

The answer traversed the whole complaint except the part relating to the defendant's title to the land and the artificial entity of the plaintiff. From a judgment adverse to him as the result of a trial before the court, without a jury, the defendant appeals.

REVERSED WITH DIRECTIONS.

For appellant there was a brief and an oral argument by *Mr. John K. Kollock.*

For respondent there was a brief over the names of *Messrs. Littlefield & Maguire* and *Mr. Clarence L. Reames,* with oral arguments by *Mr. Robert F. Maguire* and *Mr. Reames.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The chief thing to be determined is whether the papers offered by the plaintiff as proof of its allegation of its hiring as a real estate broker by the defendant were sufficient within the statute of frauds of this state. There are other questions urged relating to the

admissibility of what purported to be carbon copies of certain writings without having given notice to produce the originals; but we deem it unnecessary to consider more than the principal contention.

According to the findings, the plaintiff wrote to the defendant November 25, 1913, suggesting that it was in a position to obtain a purchaser for the realty mentioned and desiring to know what commission he would pay in event of a sale and upon what terms he wished to dispose of the property. This letter was not answered and subsequently the plaintiff wrote another communication, the contents of which were not disclosed as it was not produced. The bill of exceptions discloses the following correspondence between the parties:

"Portland, Ore., December 18, 1913.

"Great Western Land Co.,

"Eugene, Oregon.

"Gentlemen: Your favor of December First at hand and, in answer to the same, beg to state that, if you have a purchaser for my Round Prairie tract of land, consisting of thirty-five hundred eighty-two (3582) acres, I will make the price Fifteen Dollars ($15) per acre net to me. This is a bed rock price and will only be offered at that price for a short time. If, in case you have an interested party, I will give you a reasonable time in which to close the deal, but would not care to give any extended option at this time. This place sold for Fifty-four Thousand ($54000.00) six years ago, and since that time, farm lands have more than doubled in value in our county. My terms would be one half cash, and balance on three or five years' time, at eight per cent. These terms might be changed a little to suit purchaser, but any amount left standing on the place would have to bear eight per cent interest.

"Very respectfully yours,

"F. B. WAITE,

"Sutherlin, Oregon."

"December 20, 1913.

"F. B. Waite,

"Sutherlin, Oregon.

"Dear Sir: Replying to your favor of the 18th inst. and thanking you for your kind offer, on the basis of which we are now endeavoring to negotiate a deal for your property, we will say that it is possible that our client may not be able to pay one half cash at this time, but we believe that such a substantial payment will be made that the balances would be amply secured. We are co-operating with some other people in the matter of handling this deal and naturally will endeavor to make as much profit out of the transaction as possible, and will expect you to protect us in the matter of difference between the net price and the quotations to be made to the purchaser; we understand this is in the neighborhood of $20.00 an acre, although it may be considerably less before the deal is finally consummated. We feel that you are entitled to know the details of the transaction and shall be pleased to keep you informed as to our progress in the matter. Again thanking you for your favor and trusting that we may be able to be of service to you, we beg to remain,

"Yours respectfully,

"GREAT WESTERN LAND CO., INC.,

"By ————, President.

"OSH–H."

In addition thereto the instrument in writing here set out signed by the defendant was identified and introduced:

"Sutherlin, Oregon, Jan. 6, 1914.

"I hereby agree to protect you, the Great Western Land Co., of Eugene, in the sale of 3582 acres Round Prairie to Reverend Doering or associates. The price shall be not less than $16.50 to the Rev. Doering and $15 net to me subject to change only under agreement to you.

"F. B. WAITE."

So far as relates to the present contention, Section 808, L. O. L., reads thus:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing or secondary evidence of its contents, in the cases prescribed by law; * * 8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission."

1, 2. Remembering that the law says no evidence except the writing shall be received to prove the agreement, the task before us is to determine whether the writings in question comply with the terms of the enactment. In passing, we remark that the exception relating to secondary evidence of its contents naturally refers to cases where the writing is lost or is in the possession of the adverse party who refuses to produce it upon proper notice. The letter of December 18, 1913, signed by the defendant and addressed to the plaintiff, contains no intimation that the former intended to employ the latter. It merely gives terms upon which he would sell to the client of the plaintiff. Nothing more is shown by that communication than that the defendant was negotiating on his own account with the plaintiff as the representative of someone else.

The crux of the situation is in the effect of the writing of January 6, 1914, above quoted. Even in that there is no language whatever that can be construed as a hiring of the plaintiff, yet this is the very thing which the pleading put in issue and in support of which proof was required. Again, although the defendant agrees to "protect" the plaintiff, whatever that may mean, there is no consideration expressed in the document even for that covenant. There may be a mone-

tary consideration or a promise for a promise, but neither of these things is expressed in the writing. In other words, there is nothing stated in the instrument to which reference may be had as inducing Waite to subscribe the instrument. It is not enough that the language might imply a consideration, for the statute plainly says the consideration must be expressed. It appears by the bill of exceptions that despite the defendant's objections the trial court admitted oral testimony by which the plaintiff sought to establish the contract. This is in plain derogation of the requirements laid down by the Code and was manifest error. Unless we can find sufficient in the paper to establish the contract of hiring and the consideration for it the plaintiff is without proof, for the statute not only says that the agreement is void unless it is couched in the terms prescribed, but also that no evidence other than the writing shall be received. The matter has received consideration by this court in the following cases: *Taggart* v. *Hunter* (on rehearing), 78 Or. 151 (152 Pac. 871); *Lueddemann* v. *Rudolf*, 79 Or. 249 (154 Pac. 116, 155 Pac. 172). The citations from other states have but little value under our own enactment for, as pointed out by Mr. Justice BENSON in *Taggart* v. *Hunter*, 78 Or. 151 (152 Pac. 871), our own legislation is the most drastic of its kind in the United States in that it not only declares the contract void, unless there is a memorandum thereof in writing expressing the consideration and signed by the party to be charged, but goes further and excludes all other evidence of the agreement. All these writings were challenged by the objections of the defendant specifying wherein they failed to comply with the statute of frauds, but were received in evidence and were allowed to be supple-

mented by oral testimony also over the protest of the defendant. Under our Code the plaintiff was in court without any proof of the allegation of his complaint where challenged by the denials of the answer. The judgment of the Circuit Court is therefore reversed and the cause remanded, with direction to enter the judgment of nonsuit for which the defendant asked at the close of plaintiff's case in chief.

REVERSED WITH DIRECTIONS. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE HARRIS and MR. JUSTICE MCCAMANT CONCUR.

Rehearing denied February 26, 1918.

ON PETITION FOR REHEARING. PETITION OVERRULED.

(171 Pac. 193.)

Mr. C. L. Reames and *Messrs. Littlefield & Maguire*, for the petition.

Mr. John K. Kollock, contra.

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

3. Protesting against the reversal of the judgment for the plaintiff in this case with directions for the trial court to enter a judgment of nonsuit therein, the plaintiff has filed a petition for rehearing, contending that it was wrong to grant the nonsuit; that the decision was erroneous in refusing to consider testimony as to the contents of a missing letter; and that the conclusion reached was contrary to earlier decisions of this court upon the same question under the statute of frauds. For the sake of greater clarity we here set

down in full all the papers passing between the parties as disclosed by the record:

1.

"Nov. 25, 1913.

"Mr. Waite,
"Sutherlin, Oreg.
"Dear Sir:

"We understand that you are the owner of a large tract of land at Round Prairie and that the same has been submitted on the basis of $20.00 an acre. We believe that we are in a position to successfully submit this property and would like to have your authorization to submit the same and giving us the very lowest cash price on the property, also stating what commissions you would pay in the event of sale; also stating whether you would consider good income city trade for part or all of the property.

"We have some clients interested in a proposition of this kind and your immediate attention to this will be highly appreciated as our parties are waiting for an answer from us.

"Thanking you for your immediate attention to this, we beg to remain, Yours truly.

"GREAT WESTERN LAND CO., INC.
"By ———, President."

2.

As shown by the oral testimony to which allusion has been made all that the missing letter amounted to was a request from the plaintiff to Waite asking for an answer to the letter above quoted dated November 25, 1913.

3.

"December 18, 1913.

"Great Western Land Co.,
"Eugene, Oregon.
"Gentlemen:

"Your favor of December First at hand and, in answer to the same, beg to state that, if you have a pur-

chaser for my Round Prairie tract of land, consisting of thirty-five hundred eighty-two (3582) acres, I will make the price Fifteen Dollars ($15) per acre net to me. This is a bed rock price and will only be offered at that price for a short time.

"If, in case you have an interested party, I will give you a reasonable time in which to close the deal, but would not care to give any extended option at this time.

"This place sold for Fifty-four Thousand ($54,000) six years ago, and since that time, farm lands have more than doubled in value in our county.

"My terms would be one half cash, and balance on three or five years' time, at eight per cent. These terms might be changed a little to suit purchaser, but any amount left standing on the place would have to bear eight per cent interest.

"Very respectfully yours,
"F. B. WAITE,
"Sutherlin, Oregon."

4.

"December 20, 1913.

"F. B. Waite,
"Sutherlin, Oregon.

"Dear Sir:

"Replying to your favor of the 18th inst. and thanking you for your kind offer, on the basis of which we are now endeavoring to negotiate a deal for your property, we will say that it is possible that our client may not be able to pay one half cash at this time, but we believe that such a substantial payment will be made that the balances would be amply secured.

"We are co-operating with some other people in the matter of handling this deal and naturally will endeavor to make as much profit out of the transaction as possible, and will expect you to protect us in the matter of difference between the net price and the quotations to be made to the purchaser; we understand this is in the neighborhood of $20.00 an acre, altho it may be considerably less before the deal is finally consummated. We feel that you are entitled to know the

details of the transaction and shall be pleased to keep you informed as to our progress in the matter.

"Again thanking you for your favor and trusting that we may be able to be of service to you, we beg to remain, Yours truly,

"GREAT WESTERN LAND CO., INC.
"By ———, President."

5.

"Marshfield, Ore., Jan. 2, 1914.

"Great Western Land Co.,
"Eugene, Ore.

"Will be here Chandler Hotel until further notice.
"F. B. WAITE."
(Telegram.)

6.

"Sutherlin, Ore., Jan. 6, 1914.

"I hereby agree to protect you 'The Great Western Land Co.,' of Eugene in the sale of 3582 acres Round Prairie to Rev. Doering or associates. The price shall be not less than $16.50 to the Rev. Doering and $15.00 net to me. Subject to change only under agreement with you.
"F. B. WAITE."

7.

"Eugene, Ore., Jan. 6, 1914.

"F. B. Waite,
"Sutherlin, Ore.

"Out of our commission of one dollar and fifty cents per acre we will stand as a part payment for getting immediate possession Round Prairie Farm one thousand dollars one half commission payable when first payment of ten thousand dollars is made balance of commission payable out of second payment.
"GREAT WESTERN LAND CO."
(Telegram.)

The missing letter is negligible and the omission to consider testimony about it furnishes no ground for rehearing because it adds nothing to terms or condi-

tions of the negotiation. The letter opening the correspondence on behalf of plaintiff properly may be construed as that of a buying broker approaching a land owner in the interest of the former's client. The plaintiff there informs the defendant that "we have some clients interested in a proposition of this kind," and the defendant was well within his rights in considering this as an overture by those clients acting through their own broker to begin negotiations for the purchase of the land in question. We note indeed that the plaintiff asks in that letter that the defendant state what commission he would pay in the event of a sale; but asking the question does not amount to a contract. It is not a case where silence gives consent. On the contrary, in the defendant's letter of December 18th we find him treating this correspondence of the plaintiff as a quest for an option. He gives the lowest price, without any intimation about commission and after saying that the land will be offered at the price named only for a short time, he says:

"I will give you a reasonable time in which to close the deal, but would not care to give any extended option at this time."

Thus far we have no acceptance by the plaintiff of whatever offer may be framed upon the defendant's letters. In the next letter of December 20, 1913, the plaintiff fails to accept the condition imposed by the defendant for payment by the purchaser of half cash and balance on three or five years' time at eight per cent, saying

"that it is possible that our client may not be able to pay one-half cash at this time, but we believe that such a substantial payment will be made that the balance would be amply secured."

Here also is an utter lack of acceptance of the offer of the defendant so as to correspond precisely therewith. The telegram from the defendant at Marshfield throws no light upon the subject. It merely locates him until further notice. Then come the instrument he signed at Sutherlin, January 6, 1914, and the telegram sent to him by the plaintiff from Eugene on the same day. The testimony does not disclose which one of these papers was first in point of time. However, if the telegram preceded the "protect" paper, the latter instrument does not show any assent to the terms of the former whatever they are. If the "protect" paper was first then the telegram was an effort to add another condition to which no subsequent assent is shown, thus leaving the negotiation open with the result that there was no contract for want of final acceptance of the additional terms proposed.

Remembering that the statute says, "Evidence, therefore, of the agreement shall not be received other than the writing or secondary evidence of its contents," it becomes our duty to construe the quoted documents and determine whether in effect they amount to a contract of hiring as alleged in the complaint. The rule is as stated by Mr. Justice MCBRIDE in *Henry* v. *Harker,* 61 Or. 276, 290 (118 Pac. 205, 122 Pac. 298):

"But when, as in this case, the contract consists wholly of a writing or series of writings all admitted to be genuine, and containing no technical terms, the construction of the writings becomes a matter of pure law for the court: *Hutchison* v. *Bowler,* 5 M. & W. 535; *Goddard* v. *Foster,* 17 Wall. (U. S.) 123 (21 L. Ed. 589.)"

Looking at the whole case made by the correspondence to which the statute restricts us as a matter of

evidence, there is no situation disclosed where one party makes a distinct proposition to the other which is unmistakably and precisely accepted by the latter in the exact terms in which it was offered.

Moreover, as we have shown, the plaintiff approached the defendant in the character of a buying broker and agent acting and proposing to act for another party not disclosed. There is nothing in the writings on either side showing that the defendant ever assented to any change of front on the part of the plaintiff. The writing of January 6, 1914, signed by the defendant at Sutherlin is consistent only with the role assumed by the plaintiff of representing some one other than the defendant. It may be likened to the telegrams involved in the case of *Beymer Bauman Lead Co.* v. *Haynes,* 81 Me. 27 (16 Atl. 326). It seems that the plaintiff there was a wholesale dealer in paint materials and was represented by traveling salesmen. The defendants were retailers and telegraphed the plaintiff thus:

"Will you protect and guarantee us on lead until your agent gets here? We are offered inducements."

The plaintiff answered: "Yes." The court construing the word "protect" said:

"We are satisfied that the meaning of the expression was that the plaintiff would sell as low as the most favorable market price at the time."

In the light of that precedent the writing under immediate consideration is properly construed only as an agreement by Waite not to sell the land for less than $16.50 per acre, leaving the plaintiff to get as much as it could from its own client, the expected purchaser. The telegrams in the Maine case were not set down as an agreement to pay money; but were held to be a stipulation to maintain minimum prices on lead.

That is all Waite did in the present instance; granting that the writing he signed otherwise expresses a valid contract. Under that instrument the plaintiff could have quoted any price it chose to its principal subject to the minimum prescribed by its terms. It does not in any sense constitute an agreement by Waite to pay money nor a hiring of the plaintiff by the defendant; and yet hiring is what the plaintiff relies upon in its complaint.

Again, in all this correspondence there is nothing expressing anything paid or promised or a condition to be performed by the plaintiff which induced the defendant to act or to sign any writing. We might almost take judicial notice that a real estate broker is always on the lookout for a commission from whatever source it may come. On the other hand, it is equally certain that the owner of land usually declines to pay a commission unless he has promised to do so. To that end the statute was framed requiring the agreement to be reduced to writing expressing the consideration and subscribed by the party to be charged. Giving to all these writings their utmost scope as in effect one instrument, there is no language in any of them amounting to an expression of the consideration even by "necessary implication as some of the courts have put it." Even the "commission" mentioned in plaintiff's telegram of January 6, 1914, may be the compensation to be paid by the purchaser who was the client of the plaintiff as stated in its letter beginning the correspondence. Going to the limit of construction favorable to the plaintiff in the direction of implication, it cannot be "necessarily implied" that the commission mentioned was to be paid by the defendant.

In the petition for rehearing the plaintiff has cited *Bowman* v. *Wade,* 54 Or. 347 (103 Pac. 72), claiming

that the decision therein leads to the conclusion that a contract not measuring up to the statute of frauds is not always utterly void. The statute, however, says in direct terms that such an agreement *is* void. Moreover, the opinion in the case does not teach the doctrine ascribed to it. It was a case where the plaintiff averred that he had loaned to the defendant a sum of money to be repaid in three years with interest; and that, as evidence of the loan, the defendant had caused his demented son to execute a promissory note for the land secured by mortgage on land to which he had no title. The defendant himself signed no paper. Under these circumstances, on discovering the true condition of affairs, the plaintiff brought the action as for money had and received seeking to charge the defendant directly for repayment of the money. On behalf of Wade it was urged that the agreement mentioned was void so far as he was concerned because it was within the statute of frauds making void under its provisions "an agreement that by its terms is not to be performed within a year from the making thereof." So far as the statute of frauds is concerned the opinion of Mr. Justice SLATER adopted the argument of Mr. Chief Justice DIXON in *McClellan* v. *Sanford,* 26 Wis. 595, reaching the conclusion that the doctrine of the cases is that the provision of the statute now being considered applies to contracts not to be performed on either side within the year and that as the plaintiff Bowman had performed his part of the contract completely within the year by advancing the money, the statute did not apply. Even this construction was limited to cases where the stipulation sought to be enforced related solely to the payment of a money consideration.

Beyond all this also the court seems to have placed its decision upon the ground "that if it were held to be

within the statute, he [the plaintiff] may recover not upon the contract but for money had and received, if the complaint be so framed; this is undoubtedly held by many authorities'' (citing them). That is to say, the fact that the plaintiff advanced money to the defendant may be shown and for the purpose of negativing the idea that it was made to liquidate any obligation which the payer owed the payee or that it was intended as a gift, evidence of the void agreement may be received. In any event, the Bowman-Wade case is not apropos here because it is confined to cases where there is an effort on the part of the plaintiff to recover an actual payment of money and the principle is restricted to the recovery of cash considerations already paid. The distinguishing characteristic of that precedent in that respect is wanting here for it is not pretended that any money passed between the parties to the present case.

In brief, if we view the writings as an instance of contract by offer and acceptance there is no situation disclosed where one party accepts precisely and exactly the offer of the other without proposing new terms. Further, the plaintiff having assumed the attitude of a buying broker seeking for an option it has shown nothing indicating a change of front and this does not prove the allegation that the defendant hired the plaintiff; and finally, there is no language in any of the writings, taken all together, which expresses anything to be done, promised or performed by the plaintiff which would serve as an inducement or consideration sufficient to satisfy the statute and charge the defendant. The petition for rehearing is overruled.

REVERSED WITH DIRECTIONS.

REHEARING OVERRULED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE MCCAMANT concur.

MR. JUSTICE HARRIS delivered the following opinion, concurring specially:

The writings suggest that the Great Western Land Company might have occupied any one of three possible positions: (1) As a purchasing broker for its "client" H. E. Doering; (2) as an optionee, if such a term is permissible, holding an option with a limitation upon the price to be quoted by him; or (3) as a selling broker for Waite. If Waite did no more than to offer to deal with the plaintiff as a purchasing broker or as an optionee, it would avail the Great Western Land Company nothing if it did not accept such offer. If the plaintiff offered to deal with Waite as his selling broker that offer could not benefit the plaintiff if Waite did not accept it. The complaint alleges that the plaintiff was authorized and employed to act as a selling broker for Waite and hence by its pleading the plaintiff admits that it did not accept any offer that Waite may have made to deal with the plaintiff as a purchasing broker for its "clients" or as the holder of an option. If the plaintiff recovers at all it can only recover by showing that, as a result of an offer by one and an acceptance of that offer by the other, it was authorized and employed to act as a selling broker for Waite. If the writings signed by Waite disclose nothing but offers to treat with the plaintiff as a purchasing broker for its "clients" or as the holder of an option the plaintiff cannot prevail, for Waite is "the party to be charged." Looking at the writings signed by Waite it will be seen that every instrument signed by him proceeds upon the theory that he is dealing with or offering to deal with the Great Western Land Company as a purchasing broker for its "clients" or as the holder of an option. Waite never at any time agreed to pay a commission. The

first letter written by him speaks of an option and the "protect" letter of January 6, 1914, makes it clear, especially when construed in connection with the plaintiff's letter of December 20, 1913, that he did not consider that he was dealing with the plaintiff as his selling broker.

It must be remembered that the plaintiff must produce a writing or writings containing the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties: Browne on St. of Frauds (5 ed.), § 371; 20 Cyc. 258; and the writing or writings relied upon by the plaintiff must tend to prove and not disprove the existence of an agreement between the parties authorizing or employing the Great Western Land Company to sell Waite's land for him for a commission: Browne on St. of Frauds (5 ed.), § 371a; *Catterlin* v. *Bush,* 39 Or. 496, 501 (59 Pac. 706, 65 Pac. 1064). Giving the writings signed by the plaintiff a meaning most favorable to the plaintiff and then examining the writings signed by the defendant it cannot be said that the parties at any time made an agreement authorizing or employing the plaintiff to sell the land for a commission or compensation to be paid by Waite. The defendant is the party to be charged and the essential terms of the agreement must be in writing signed by him; and while it is true that the statute is satisfied by letters and telegrams it is also true that the requirements of the statute are not fulfilled if the letters and telegrams amount to nothing more than offers and unaccepted counter offers.

The promise sued upon is the alleged promise of Waite to pay a commission for finding a purchaser. It is not claimed that the plaintiff paid anything or

made any promise to Waite as a consideration for his alleged promise to pay a commission and therefore the alleged service to be rendered by the plaintiff would be the consideration for the promise sued upon. Laying aside any question concerning the expression of the consideration and viewing the service to be performed by the broker solely as one of the essential elements of the contract, it must, of course, like the other essential elements of the contract, be stated in the writing with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties; and if the service to be performed were so stated it would probably be sufficiently expressed to satisfy the statute when viewed as the consideration for the promise sued upon, for it would be difficult to conceive of a writing which would not either in terms or by necessary implication show the consideration for the promise to pay a commission where the service to be performed by the broker is the consideration for the promise of the owner and the writing contains all the essentials of an agreement authorizing a broker to sell land for a commission. The obstacle confronting the plaintiff in the instant case is that the writings do not disclose an agreement by Waite to pay the plaintiff a commission if the latter found a purchaser. If the writings did reveal such an agreement they would probably contain an expression of the consideration, assuming that the service of the broker constituted the consideration, for it is everywhere held, including jurisdictions having statutes requiring the consideration to be expressed, that the consideration is sufficiently expressed if it is "expressly expressed" or if it appears by necessary inference: *Osborne* v. *Baker,* 34

Minn. 307, 311 (25 N. W. 606, 57 Am. Rep. 55). In no jurisdiction is it held that the consideration is not expressed when it appears by necessary inference. The petition for a rehearing should be denied.

Argued November 27, suit dismissed December 11, 1917, rehearing denied February 26, 1918.

WILSON v. CITY OF PORTLAND.

(169 Pac. 90; 171 Pac. 201.)

Pleading—Judgment—Answer.

1. Where there was traversed matter in defendant's answer strongly appealing to court of equity against granting plaintiff any relief, the sustaining of plaintiff's motion for decree on the pleadings was error.

Municipal Corporations — Public Improvements — Assessments — Restraining Collection—Grounds.

2. Ordinarily a court of equity will not interfere to restrain the collection of a special assessment for municipal improvements in cases of mere illegality or irregularity, but its jurisdiction is confined to cases where the tax is not authorized by law, or is assessed on property not subject to taxation, or by persons without authority.

[As to injunction to restrain the collection of taxes and assessments, see notes in 69 Am. Dec. 198; Ann. Cas. 1915C, 755.]

Municipal Corporations—Public Improvements—Special Assessments.

3. Portland City Charter, Section 397, relating to assessment for street improvements, declares that no assessment shall be held invalid by reason of mistakes, delays, errors, or irregularities in any act or proceeding in the improvements of a street. Section 400 declares that, whenever an assessment for the improvement of any street shall be annulled, or when the council shall be in doubt as to the validity of any such assessment, the council may by ordinance make a new assessment or reassessment on the land benefited by such improvement. Plaintiff, the owner of property abutting on a street, sought to have set aside as a cloud on his title the lien of a special assessment on the ground that, when the proceedings for the improvement were initiated, the street had already been paved, and that thereafter no other pavement had been constructed. *Held* that, without any showing that the city was not ordering reassessment for improvements already made, plaintiff was not entitled to any relief, it seeming that he was seeking to avoid assessments for improvements already constructed, and hence a decree on pleadings in favor of plaintiff, whose complaint alleged the foregoing acts, was erroneous, particularly as the city's answer alleged that the assessment was a reassessment on account of omissions in the first; for equity will not interfere

to restrain the collection of an assessment for mere illegality or irregularity.

ON PETITION FOR REHEARING.

Municipal Corporations — Street Improvements — Reassessment — Amendment of Jurisdictional Defects in Ordinances.

4. Under Portland City Charter, Section 400, all manner of errors and irregularities in ordinances for assessment of street improvements may be corrected whether jurisdictional or otherwise, and a reassessment made for pavement already laid.

Municipal Corporations — Street Assessments — Freeholder's Right to be Heard.

5. Under such charter provision, a freeholder of Portland should make his objection to street improvements in the beginning, since it is never too late for the city to amend a defect in ordinance for assessment therefor, provided only that somewhere the freeholder has had opportunity to be heard before his property is taken for payment of the tax.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

In this suit against the City of Portland the plaintiff declares that he is the owner in fee simple of some realty abutting upon the east side of East Twenty-ninth street in that city. His initiatory pleading recites that by virtue of a certain ordinance passed by the council of that municipality his holding was assessed in certain sums for the cost of improving the half street already mentioned; and further traces the procedure to the point where it is ripe for sale of the property to satisfy the liens so created. The only objection urged by plaintiff against the action of the city in the premises is found in this allegation:

"That at the time the said proceedings for the improvement of said east half of East Twenty-ninth Street, within the limits above specified were initiated, said street had already been improved with bitulithic pavement, and during all of the time which had elapsed since said date, said improvement of said street which had been so made continued to exist and still exists, and no improvement of any nature whatever was made by said City of Portland nor by anyone

after the initiation of said proceedings and up to the present time, and plaintiff's said real property has been assessed as aforesaid for an improvement which has not been made either in whole or in part."

Contending that these transactions constitute a cloud upon his title, he prays that they all be declared void and the cloud removed.

After sundry denials the answer of the city avers in substance that the property in question was situated in Olmsted Park, which was owned by one B. M. Lombard, who was desirous of having the streets in that addition, together with the east half of East Twenty-ninth Street, improved, and requested the city to make the improvement at the expense of his property; that the city, in obedience to the express desire of Lombard, undertook to make the improvement, and that in the course of the proceedings one of the employees in the city engineer's office, in preparing the initiatory resolution, omitted therefrom the words "the east half of the street," which omission was not noticed by anyone, either the city officials or the interested freeholders. The answer then charges that the proceedings were carried forward according to the original intention of the city and the property owners; that the street was actually improved and the work completed without a discovery of the error until the city officials came to make up assessments apportioning the cost of the undertaking, whereupon they consulted Lombard, who expressed himself as being satisfied with the improve ment and stated that the cost thereof should be paid; that plaintiff and Lombard suggested that the better course to pursue would be to take supplemental proceedings to make an assessment against the property especially benefited by the improvement, and further represented that they would not make any objection

or protest against such supplemental proceedings and that the resulting assessments would be paid or bonded.

The answer proceeds substantially to state that, relying on the representations of Lombard and the plaintiff who, it avers, is acting for the former in the premises, the city took the steps mentioned in the complaint resulting in the assessment to which objection is now made; all without any dissent on the part of any property holder. The defendant further alleges that in reliance upon the statements and representations of the plaintiff and Lombard, and upon the validity of the proceedings which they now assail, it issued and delivered warrants for city improvements to the assignee of the contractor installing the pavement in the sum of $1,917.85, which warrants are still outstanding. It is also charged that the betterment was valuable; that it increased the worth of each of the lots in the amount assessed for its payment; and that all of the owners thereof, without making any protest, sat by and watched the improvement being made, well knowing that it was intended by the defendant city to make the same at the cost of the owners of abutting property and assess the expense thereof against the same. It seems that an order was entered permitting Lombard to intervene and file an answer, and issue was joined not only upon the city's answer but also upon the answer of Lombard. At this stage of the proceedings the Circuit Court sustained the motion of the plaintiff for a decree against the defendant on the pleadings, and the city has appealed.

REVERSED. SUIT DISMISSED.

For appellant there was a brief with oral arguments by *Mr. Walter P. La Roche,* City Attorney, and *Mr. Lyman E. Latourette,* Deputy City Attorney.

For respondent there was a brief and an oral argument by *Mr. William M. Gregory.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1, 2. Considered solely as a matter of procedure, the motion for a decree on the pleadings in favor of the plaintiff should not have been allowed because there was traversed matter in the city's answer strongly appealing to a court of equity against granting plaintiff any relief in the premises. The essence of this suit, however, is an attack upon an assessment upon abutting property for the purpose of paying for the improvement of a street. The canon by which said matters must be determined is laid down by Mr. Justice ROBERT S. BEAN in *Yamhill County* v. *Foster,* 53 Or. 124 (99 Pac. 286), in this language:

"It is a general rule that a court of equity will not interfere to restrain the collection of public revenue for mere illegality or irregularity in the proceedings, but its jurisdiction is confined to cases where the tax itself is not authorized by law, or is assessed on property not subject to taxation, or the persons exacting it are without authority in the premises, or have proceeded fraudulently, or some other ground of equitable interference is shown."

The rule has been applied to assessments similar to those of the case here involved, in *Lapp* v. *Marshfield,* 72 Or. 573 (144 Pac. 83).

3. Section 397 of the Charter of the City of Portland, in speaking of assessments for street improvements, declares:

"No such assessment shall be held invalid by reason of failure to enter the name of the owner of any lot or part of a lot or parcel of land so assessed or by a mistake in the name of the owner, or the entry of a name

other than the name of the owner, in said assessment, or in any acts or proceedings connected therewith, and no delays, mistakes, errors, or irregularities in any act or proceeding in the improvement of a street or the construction of a sewer or drain shall prejudice or invalidate any final assessment, but the same may be remedied by subsequent and amended acts or proceedings."

Section 400 of the same Charter reads in part as follows:

"Whenever an assessment for the opening, altering or grading of any street, * * or for any local improvement which has been or may hereafter be made by the city, has been or shall hereafter be set aside, annulled, declared or rendered void, * * or when the Council shall be in doubt as to the validity of such assessment or any part thereof, the Council may, by ordinance, make a new assessment or re-assessment upon the lots, blocks or parcels of land which have been benefited by such improvement to the extent of their respective and proportionment shares of the full value thereof. * * Such re-assessment shall be made and shall become a charge upon the property upon which the same is laid, notwithstanding the omission, failure or neglect of any officer, body or person to comply with the provisions of this Charter connected with or relating to such improvement and assessment and notwithstanding the proceedings of the Council, Executive Board, Board of Public Works, or any officer, contractor or other person connected with such work may have been irregular or defective, whether such irregularity be jurisdictional or otherwise. * * "

Reverting to the single objection made by the plaintiff to the effect that the improvement already had been made, we note that within the terms of Section 400 this does not present an obstacle to the making of a new assessment, for that part of the charter refers to properties "which have been benefited by such improvement." This language clearly refers to a better-

ment already accomplished in fact. The case was decided in the Circuit Court upon plaintiff's motion for a decree upon the pleadings. In such a case the moving party must be impregnably entrenched in the statement of his case or he cannot prevail. The issue presented by such a motion is one of law to the effect that granting the truth of all that is alleged by both parties yet the decision should be in favor of the one making the motion. The complaint in this instance discloses a proceeding for the imposition of an assessment upon abutting property ostensibly carried on with complete formality. The plaintiff does not offer to pay any proper rating of the cost or declare that the expense of the betterment has been paid by anyone. He virtually adopts the improvement but his pleading does not state enough to take the proceeding out of what might be accomplished under Section 400 of the Charter contemplating renewed assessments for work already completed under defective procedure. Reverting to the rule of *Yamhill County* v. *Foster,* 53 Or. 124 (99 Pac. 286), we find that a tax for the purpose of street improvement is authorized by the Charter of the city. That instrument empowers the municipality to levy such a charge upon abutting property, and this authority is vested in the city council. There is no charge that there has been any fraud in any of the proceedings. In short, the complaint does not differentiate the case from one where the city has undertaken to make a new assessment, as of right it may do, on the ground that the proceedings prior to the actual making of the improvement were informal or without jurisdiction. Until this is shown equity cannot relieve the plaintiff, for he does not bring himself within the principle established in the Foster case. The power of a city to make repeated assessments

under a charter like that of the City of Portland to pay for actual improvements already made has had the consideration of this court in *Phipps* v. *Medford,* 81 Or. 119 (156 Pac. 787, 158 Pac. 666), where a more complete discussion of the principle may be found.

The complaint itself discloses that the improvement has been made. It indicates that the plaintiff would enjoy the same without paying for it even what is fair. This savors strongly of an attempt to get something for nothing, which is inequitable even as against a municipality. Judged by his own pleading, the plaintiff was not in a position to urge his motion for a decree in his favor. His complaint does not state a cause of suit commending itself to a court of conscience, in that he does not offer to do equity. Upon the whole record, the case is properly disposed of by a decree dismissing the suit. It is so ordered.

REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Rehearing denied February 26, 1918.

ON PETITION FOR REHEARING. DENIED.

(171 Pac. 201.)

Mr. W. M. Gregory, for the petition.

Mr. Walter P. La Roche, City Attorney, and *Mr. Lyman E. Latourette,* Deputy City Attorney, *contra.*

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

In his petition for rehearing the plaintiff lays much stress upon the case of *Murray* v. *La Grande,* 76 Or.

598 (149 Pac. 1019), as being in direct conflict with the former opinion in the instant case. In prescribing the formula for street improvements the La Grande charter under which the Murray proceedings were had states in substance that when an improvement is proposed a committee of the council shall examine the property and make a report as to its valuation and extent and of the benefits to be derived thereby on account of the proposed improvement.

After receiving the report and before making any levy of taxes on plaintiff for the improvement the council must cause notice to be given in terms prescribed by the charter, giving sundry details not necessary here to mention, after which follows this language:

"After a compliance with this subdivision the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

This is the only manner and time prescribed by the La Grande charter in which jurisdiction may be acquired. It is also said in the same section:

"If any assessment is set aside by order of any court the council may cause a new one to be made in like manner for the same purpose for the collection of the amount so assessed."

It will be noted that in the La Grande charter there is but one time and place in the process where the city may obtain jurisdiction; and the power of correction vested in the council does not include an amendment to cure the defect in the proceedings by which the acquisition of jurisdiction was attempted. It seems, therefore, that one effort to acquire jurisdiction would exhaust the prerogative of the council in that particular proceeding. It was conceded in that case that the City of La Grande had not done the things prescribed by its charter as the necessary foundation of jurisdiction.

4, 5. The authority of the City of Portland under its charter is much more extensive and far-reaching. As pointed out in the former opinion, Section 400 of the Portland Charter empowers the municipality to correct all manner of errors and irregularities whether they be "jurisdictional or otherwise." The distinction between the two charters is found in the fact that in that of La Grande there is provided but one point in the procedure where the city can acquire jurisdiction for any purpose and beyond which it cannot retrace its steps in its effort to amend its errors; while that of Portland enables the municipality to go back and begin again even to rectify any lack of authority not excepting the absence of jurisdiction itself. In brief the Portland Charter permits correction of jurisdictional defects while that of La Grande under consideration in the Murray case did not.

So it is a possible event that acting either directly or through the agency of contractors the city may have laid down a pavement as stated in the complaint herein before discovering its mistake in supposing it had acquired authority to do so. Yet it is not powerless to escape the consequences of such a blunder although the effort to extricate itself may involve the exercise of the taxing power. The complaint does not differentiate the plaintiff's grievance from such circumstances. He argues that a mere volunteer might pave a street and the city could pay for it, but his complaint does not state such a case. That question is not presented on the record before us and we make no intimation what the decision should be if the city, as an act of its sovereignty, should adopt some completed but unauthorized work of the kind which it deemed of real public benefit and as an exercise of its taxing prerogative should essay to lay a special impost with which to raise funds

to pay for it. Under the present Portland charter it behooves the freeholder to be vigilant in respect to street improvements in his vicinity and resist them in their incipiency if he has cause for doing so. He cannot safely wait until a pavement is installed and then for the first time begin to object; for that is one of the things the city can put in the street and make him pay for. It may err in its effort to acquire authority over the adjacent property in the beginning but it seems to be a case of "never too late to mend," and the municipality may return again and again to the task until it reaches the desired result, always provided that somewhere in the process the freeholder has an opportunity to be heard before his property is taken for payment of the tax. The petition for rehearing is overruled.

REVERSED. REHEARING OVERRULED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued December 13, 1917, reversed and remanded January 29, rehearing denied February 26, 1918.

THE OREGON HOME BUILDERS *v.* CROWLEY.*

(170 Pac. 718; 171 Pac. 214.)

Appeal and Error—Judgment on Demurrer—Acceptance of Facts in Complaint as True.

1. For purposes of plaintiff's appeal from judgment rendered on demurrer to the complaint, the statement of facts found in the complaint must be accepted as true.

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*On the question of mutuality of contract giving real estate broker exclusive authority to sell, or promise him commission in case of sale by anyone else, but not on terms imposing any obligation on him, see notes in 19 **L. R. A. (N. S.)** 599; **L. R. A.** 1917E, 1040.

On necessity that agent's authority to purchase or sell real property be in writing to enable him to receive compensation for his services, see notes in 44 **L. R. A.** 601; 9 **L. R. A. (N. S.)** 933.

REPORTER.

Contracts—Consideration—Contract to Pay Commission.

2. The services rendered by a corporation employed to procure an exchange of realty were the consideration for its employer's promise to pay commission, because the services to be rendered furnished the only inducement for the promise.

[As to when the consideration for a contract is sufficiently expressed, see note in 60 **Am. St. Rep.** 432.]

Brokers—Employment of Broker—Writing Stating Amount of Commission—Statute of Frauds.

3. By the statute of frauds, Section 808, subdivision 8, L. O. L., rendering void an agreement authorizing or employing an agent or broker to sell or purchase realty for compensation or a commission, the writing employing a broker must state the amount of the commission agreed to be paid to him, that being a requirement predicated on the fact that the amount of the commission agreed upon constitutes a term of the contract.

Words and Phrases—"Consideration"—"Price."

4. "Price" and "consideration" should not be confounded, for, though sometimes the same, they are not always identical.

Brokers—Contract of Employment of Broker to Exchange Realty—Writing Expressing Consideration.

5. The writing signed by an owner of property employing a corporation to procure its exchange, reading that he agreed to pay the corporation in cash as a commission for its services 2½ per cent on the selling price of the price for which the property was sold or at which it was exchanged, satisfied the statute of frauds, Section 808, subdivision 8, L. O. L., as to agreements employing agents or brokers to sell or purchase realty, by expressing the consideration.

Brokers—Contract—Performance of Action on Which Promise was Conditioned—Conversion of Offer Into a Binding Agreement.

6. Where a corporate realty broker, employed to effect an exchange of property, did so, thus performing the act on which its employer's promise to pay commission was conditioned, it furnished the consideration necessary to convert its employer's promise to pay commission into an obligation to pay it, thus transforming into a binding agreement, satisfying the statute of frauds, Section 808, subdivision 8, L. O. L., its employer's written offer to pay commission for services in effecting exchange.

Frauds, Statute of—Good Contract.

7. Whatever would be a good contract under the law of contract in the absence of the statute of frauds is a good contract in the presence of the statute, providing only that it complies therewith by being in writing and expressing the consideration.

Frauds, Statute of—Requirements of Writing.

8. A writing, to satisfy the statute of frauds, Section 808, L. O. L., must show the contracting parties, intelligently identify the subject matter, disclose the terms and condition of the agreement, express the consideration, and be signed by the party to be charged.

ON PETITION FOR REHEARING.

Contracts—Consideration—Broker's Contract.

9. An owner's promise in his written offer to pay a commission for the sale or exchange of realty was designed to procure a broker's services, such services to be rendered are taken as the consideration for the promise.

Brokers—Contract—Statute of Frauds—Consideration.

10. Under Section 808, subdivision 8, L. O. L., requiring broker's contract to buy or sell to state the consideration, while the consideration must be expressed, it need not be formally and precisely expressed, and it is sufficiently expressed if it appears by necessary inference.

Brokers—Statute of Frauds—Written Offer—Parol Acceptance.

11. A written offer may constitute a sufficient memorandum of the broker's written contract required by Section 808, subdivision 8, L. O. L., to charge the party making it, if it is later accepted by parol.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is an action by the Oregon Home Builders, a corporation, to recover a commission for procuring an exchange of lands. The trial court sustained a demurrer to the complaint; the plaintiff refused to plead further; a judgment was rendered for the defendant; and the plaintiff appealed. For the purposes of the appeal the statement of facts found in the complaint must be accepted as true. The complaint alleges that on October 26, 1915,

"the defendant, in writing, authorized and employed plaintiff to sell or exchange property of which the defendant was the owner."

The writing is as follows:

"Realty Contract.

"Portland, Oregon, Oct. 26, 1915.

"To the Oregon Home Builders:

"You are hereby employed and authorized to offer for sale or exchange and given the sale of the property described in the margin hereof, at the price and terms noted therein or at such other price and terms as I

may hereafter agree to. You are hereby authorized by me to accept a deposit to be applied on the purchase price of said property, and, in my name, to execute and deliver a binding written contract for the sale and conveyance of the said above-described property. In the event that you find a buyer ready and willing to consummate a deal for said price and terms or on such other terms and price as may be agreed to by me, or place me in touch with a buyer to whom I at any subsequent time sell or convey said property, I hereby agree to pay you in cash, as a commission for your services, the following sums, to-wit, 2½% on the selling price of the price for which said property is sold or at which it is exchanged, which said commission I authorize you to retain out of the first money paid on the purchase price of said property as a deposit, or otherwise.

"I hereby warrant the information given in the margin to be true and that I am in peaceable possession of the said described property, that my title to the same is perfect, and is without encumbrance, except as stated, and that I will furnish a satisfactory abstract of title brought down to the date of sale showing such title.

"In case of an exchange of my said property I have no objection to your representing and accepting compensation from the other party to the exchange as well as myself.

"I agree to furnish an abstract of title to the date of sale.

"I further agree that this contract and the authority hereby conferred shall continue in effect until I give you 15 days' notice of withdrawal.

"J. M. CROWLEY.

"Address 203–4 Panama Bldg.

"Telephone No. M. 2630."

In the margin appears the following:

"If city property, fill the following blanks: Legal description Lot 8, Block 242, E. Portland, Addition to the city of Portland, County of Multnomah, state of Oregon, 40 50 x 100. Location by street or number 89 E. 12th. Price, $20,500.00. Terms, want impr.

farm. Present encumbrances: Mortgage $5500.00, city liens, bonded, $600.00. Are interest charges and all bonded assessments paid to date? Yes. Character of improvements, Concrete Apt. 5–2 room—14 rooms on second floor with 2 baths.

"1st floor—5–2 rooms and bath $15.00 per month.

"2nd floor—2–2 room, no bath, $12.00 per month. 3–3 room and no bath, $12.00 per month.

"Additional information, 40 x 100 S. W. Cor. 12th and E. Stark.

"Income: Has brought 1500 to 2500 per year. No expenses."

The plaintiff avers that it "accepted said employment and contract orally." Continuing, the plaintiff alleges that while the "contract" was still in effect it "found and procured a buyer for said property in the person of one Blanche Todd," who owned some land in Clackamas County. After "numerous and continuous negotiations * * in many of which plaintiff assisted, associated and participated" Blanche Todd and the defendant exchanged properties. The property of the defendant was priced at $20,500; and the plaintiff is attempting to recover a commission of $512.50, being 2½% of the selling price. REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. W. B. Shively.*

For respondent there was a brief over the name of *Messrs. Angell & Fisher,* with an oral argument by *Mr. H. D. Angell.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The only question for decision is whether the writing signed by Crowley satisfies the statute of frauds. The defendant contends that the writing is insufficient to meet the requirements of Section 808, L. O. L., be-

cause (1) it fails to express the consideration; and (2) it is a mere offer and therefore not an agreement. Section 808, subdivision 8, L. O. L., reads thus:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law:— * *

"8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

Our statute was adopted in 1862 as a part of the Civil Code and, as originally enacted, it embraced seven subdivisions which covered the several classes of cases which were provided for by the fourth and seventeenth sections of the English Statute of Frauds. Subdivision 8 was added to our statute in 1909. In each of the eight classes of cases mentioned in Section 808, L. O. L., there must be a writing or writings evidencing the agreement and expressing the consideration. The contention that the writing signed by Crowley does not express the consideration naturally involves two questions: (1) What is the consideration that must be expressed; and (2) when can it be said that the consideration is expressed. There was a reason for inserting in our statute the clause "expressing the consideration." A history of the English statute and the fact that American courts had differed in their views about the necessity of expressing the consideration under their respective statutes of frauds serve to explain the clause in question.

The Statute of Frauds, 29 Car. II, c. 3, became operative in 1677. The fourth section provided:

"And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June noe Action shall be brought whereby to charge any Executor or Administrator upon any speciall promise to answre damages out of his owne Estate (2) or whereby to charge the Defendant upon any speciall promise to answre for the debt, default or miscarriages of another person (3) or to charge any person upon any agreement made upon consideration of Marriage (4) or upon any Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them (5) or upon any Agreement that is not to be performed within the space of one yeare from the making thereof (6) unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized."

It will be observed that the fourth section does not in terms require an expression of the consideration. However, in the celebrated case of *Wain* v. *Warlters,* 5 East, 10, decided in 1804, it was held that the writing must express the consideration. Wain and another were the indorsees and holders of a bill of exchange dated February 14, 1803, drawn by one Gore upon and accepted by one Hall, whereby Gore requested Hall 70 days after date to pay to Gore's order 56£, 16s and 6d. The sum expressed in the bill of exchange became due and the indorsees retained an attorney to sue Gore and Hall for the amount due, when Warlters on April 30, 1803, in consideration that the indorsees would forbear to proceed for the recovery of the amount due on the bill of exchange, promised the indorsees to pay them by half-past 4 o'clock that day 56£. and the expenses which had then been incurred by them on the bill of exchange. The indorsees stayed proceedings against Gore and Hall and upon the failure of Warlters to make payment they sued Warlters. At the trial they pro-

duced a writing signed by Warlters which was in these words:

"Messrs. Wain and Co. I will engage to pay you by ½ past 4 this day fifty-six pounds and expenses on bill that amount on Hall. (Signed) Jno. Warlters, (and dated) No. 2, Cornhill, April 30th, 1803."

Warlters objected to the writing upon the ground that it did not express the consideration. It was held that the word "agreement" included both the promise and the consideration and since the writing only contained the promise and made no reference to the consideration for the promise it did not comply with the fourth section of the statute of frauds. The decision in *Wain* v. *Warlters* has probably caused more discussion than any other case dealing with the statute of frauds. Some of the American courts followed *Wain* v. *Warlters* while others declined to do so: Browne on St. of Frauds (5 ed.), § 390; Anson on Contracts (2 Am. ed.), 70, note 2; 1 Reed on St. of Frauds, §§ 421, 422 and 427; 20 Cyc. 262. Prior to the adoption of Section 808, L. O. L., the courts of this country had been differing in their opinions as to whether or not a statute which required an agreement to be in writing meant that the consideration as well as the promise should be in writing, and in order to make the statute certain the legislature inserted the clause "expressing the consideration." In a few of the states statutes have been enacted, as in Oregon, requiring the consideration to be expressed in the writing while many of the states have expressly provided by statute that the consideration for an agreement within the statute of frauds need not be expressed in the writing; and in those states where the statute, like the English statute of frauds, does not in terms speak of the consideration for the agreement, the courts are still divided upon the question of whether the consideration must be expressed as ruled in *Wain* v.

Warlters: Browne on St. of Fr. (5 ed.), §§ 391, 393; 20 Cyc. 262.

The territory of Alaska and the states of Alabama, Minnesota, Nevada and Wisconsin have enacted statutes requiring an expression of the consideration in the writing: Comp. Laws of Alaska (1913), Section 1876; 2 Code of Ala. (1907), Section 4289; General Statutes of Minn. (1913), Section 6998; Revised Laws of Nev. (1912), Section 1075; Wis. Statutes (1913), Section 2307. In Colorado the writing must contain an expression of the consideration if it be a contract for the leasing of land for a longer period than one year or if it be for the sale of any interest in land; Mills' Col. Stat. (1912), Section 3061.

The statute of frauds first enacted in New York on February 26, 1787, like the English statute, did not in terms require an expression of the consideration: 1 N. Y. Revised Laws (1802), p. 79, Section XI. However, the statute was afterwards amended by requiring that the contract or agreement "or some note or memorandum thereof, expressing the consideration, be in writing": 2 Revised Statutes of New York (1829), Ch. 7, Title I, Section 8 and Title II, Section 2, p. 135. In 1863 the legislature again amended chapter 7, Title II, Section 2 of the Revised Statutes by eliminating the words "expressing the consideration": Laws of New York, 86th Sess. (1863); 4 Birdseye's Cumming & Gilbert's Con. Laws of New York Ann., p. 4188, Section 31. This legislation must be kept in mind when reading the New York decisions.

Statutes expressly providing that the consideration need not be expressed in the writing have been enacted in the territory of Hawaii and in the states of Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, New Jersey, Virginia and West Virginia: Section 2660, Revised Laws of Hawaii; Section 5869, J. & A. Ill.

Stat. Ann.; 3 Burns' Ann. Ind. Stat. (1914), Section 7464; Section 470, Carroll's Ky. Stats. (1915); Ch. 114, Section 1, p. 1395, Revised Stats. of Me. (1916); Revised Laws of Mass. (1902), Ch. 74, Section 2; Howell's Mich. Stat. (1912), Sections 11,396, 11,403; 2 Comp. Stats. of N. J. (1911), Section 9, p. 2616; Pollard's Code of Va. (1904), Section 2840; W. Va. Code (1913), Section 4171.

Tennessee has a statute which provides that all contracts in writing signed by the party to be bound are *prima facie* evidence of a consideration: Shannon's Ann. Code of Tenn. (1917), Section 3214. In the states of Montana and Idaho a written instrument is by statute made presumptive evidence of a consideration: 1 Rev. Codes of Mont. (1907), Section 5010; 1 Ida. Rev. Codes (1907), Section 3314.

While as already shown courts and legislatures may differ in their views as to whether or not the consideration for an agreement within the statute of frauds must be expressed in the writing, nevertheless it is quite manifest that the term "consideration" has a definite meaning. It does not have one definition when applied to subdivision 8 and another when applied to the remaining subdivisions of Section 808, L. O. L. It cannot have one signification under the English statute and another under the American statutes. The "consideration" which by force of judicial opinion must be expressed to comply with the English and some of the American statutes is the same "consideration" which by force of the statute itself must be expressed to comply with a few of the American statutes; and so too the "consideration" which by force of judicial decision need not be expressed in some of the states is the same "consideration" which by force of statute need not be expressed in many of the states. In brief a

definition of "consideration" applicable to one statute of frauds is equally applicable to all other statutes of frauds, because they all deal with agreements; and a definition which will apply to the first seven subdivisions of Section 808, L. O. L., will likewise apply to the eighth subdivision.

One author defines "consideration" as "a benefit to the party promising or a loss or detriment to the party to whom the promise is made": 9 Cyc. 308. Another text-writer states that "consideration is that which moves from the promisee, or to the promisor, at the express or implied request of the latter, in return for his promise": Clark on Contracts (3 ed.), § 61. Blackstone says that the consideration upon which a contract is made is "the reason which moves the contracting party to enter into the contract": 2 Black. Com. 444. In *Lueddemann* v. *Rudolph,* 79 Or. 249, 257 (154 Pac. 116, 155 Pac. 172), this court said: "The consideration is that which induces a party to act or promise." The same test is announced in *Hildebrand* v. *Bloodsworth,* 12 Or. 75, 78 (6 Pac. 233), and in *Woods* v. *Dunn,* 81 Or. 457, 467 (159 Pac. 1158). A prominent text-writer says that "consideration may be defined as any act or forbearance called for and induced by the promise": 1 Elliott on Cont., § 203.

2. The consideration for the promise upon which this action is brought cannot be said to be a promise made by the plaintiff or money paid by it, because the writing does not state nor is it claimed that the plaintiff gave a promise or paid money for the promise of the defendant. If the consideration is not found in a promise made by the plaintiff or money paid by it then it must be found either in the act performed by the plaintiff or in the commission to be paid. The action is brought upon a promise made by the defendant. The promise is to pay a certain sum of money as a commission. How

can it be said that the commission or the payment of it is the inducement for the promise to pay it when the payment of a fixed commission is a part of the promise itself. The amount promised measures the extent of the promise and the payment of the amount is the fulfillment of the promise and not the consideration for the promise. Eliminate the commission and there is no promise. The promise and the consideration are not the same thing. The promise to pay is not its own inducement to pay. In *Wain* v. *Warlters* the action was brought on the promise of Warlters to pay, while the consideration for the promise was the forbearance to sue. The service rendered by the Oregon Home Builders is the consideration for the promise upon which this action is brought because the service to be rendered furnished the only inducement for the promise: *Hall* v. *Olson,* 58 Or. 464, 466 (114 Pac. 638); *Henderson* v. *Lemke,* 60 Or. 363, 365 (119 Pac. 482); *Woods* v. *Dunn,* 81 Or. 457, 467 (159 Pac. 1158). In *Roberts* v. *Griswold,* 35 Vt. 496 (84 Am. Dec. 641), David Roberts, an attorney, had rendered services for Daniel B. Griswold and afterwards A. V. Griswold wrote to Roberts thus:

"I can assure you that he [referring to Daniel B.] is perfectly good, and will hold myself accountable that he shall pay you for all the services you have or may render him in the suit with Sheldon";

and it was held that "the services thereafter to be rendered constituted the consideration." In Browne on the Statute of Frauds (5 ed.), Section 405, we find the following:

"As a general rule, however, in all cases where the language of the memorandum shows with reasonable clearness that the defendant's promise is designed to procure something to be done * * by the party to whom it is made, * * for the promisor, * * such act * * so

stipulated for by the defendant, is taken to be the inducement to his promise."

The promise made by Crowley was designed to procure the services of the Oregon Home Builders in offering a sale of his land and therefore the services, when rendered, constituted the consideration for the promise.

3, 4. It is true that the writing must state the amount of the commission agreed to be paid to the broker but it is also true that this requirement is predicated upon the fact that the amount of the commission agreed upon constitutes one of the terms of the contract which must be in writing: 3 Jones on Ev., § 429, p. 128. Price and consideration should not be confounded for, though sometimes the same, they are not always identical. Even in those states where the writing need not state the consideration for a promise it is nevertheless generally held that the price agreed upon by the parties must be stated in the writing because, for example in the case of a contract of sale, the price when agreed upon is one of the component terms of the contract: Browne on Statute of Frauds (5 ed.), §§ 376, 381, 381a, 381b; 3 Jones on Ev., § 429, p. 128; 20 Cyc. 269. If, however, one party agrees to sell property to another and the parties do not fix a price it is generally held that the writing need not refer to the price on the theory that what the law is deemed to write into the contract, the parties need not also write: 3 Jones on Ev., § 429, p. 128; Browne on Statute of Frauds (5 ed.), § 377; 20 Cyc. 263. This general doctrine has been applied in California to a statute like our subdivision 8: Deering's Civil Code of Cal. (1915), § 1624, subd. 6. In *Muncy* v. *Thompson,* 26 Cal. App. 634 (147 Pac. 1178), it was held that "in the absence of any agreement as to commission, the agent, if authorized in writing to negotiate a sale of real estate, is entitled to a reasonable

compensation for his services." In Washington, another state with a statute like subdivision 8, it is held that the amount of the commission must be stated in the writing: Pierce's Wash. Code Annotated (1912), Tit. 203, § 3, subd. 5. In *Foote* v. *Robbins,* 50 Wash. 277 (97 Pac. 103), the court said:

"If by the written agreement the payment of a commission by respondents was contemplated, resort must now be had to oral evidence for the purpose of showing the amount of such commission, and that it was to be paid by the appellant as vendor and not by the purchaser as vendee. The unmistakable purpose of the statute was to avoid any such method of fixing the extent of the liability, or the liability itself, of either a vendor or a vendee for the payment of a commission."

This rule was announced on the authority of *Zimmerman* v. *Zehendner,* 164 Ind. 466 (73 Pac. 920, 2 Ann. Cas. 655), construing an Indiana statute in substance the same as ours; and in this connection it is interesting to note that since May 6, 1853, Indiana has had a statute reading thus:

"The consideration of any such promise, contract or agreement need not be set forth in such writing, but may be proved:" 3 Burns' Ann. Ind. Stat. (Rev. of 1914), § 7464.

See also: *Forland* v. *Boyum,* 53 Wash. 421 (102 Pac. 34); *Keith* v. *Smith,* 46 Wash. 131 (89 Pac. 473, 13 Ann. Cas. 975); *Houtchens Co.* v. *Nichols,* 81 Wash. 238 (142 Pac. 674). In at least two of the states, Nebraska and New Jersey, the question is taken from the field of judicial construction by positive statutes which provide that the amount of the commission must be stated in the writing: Rev. Stats. of Neb. (1913), Section 2628, p. 739; 2 Comp. St. of N. J., p. 2617, Section 10. The difference between the views expressed by courts of other jurisdictions as well as the express

statutory requirements in some of the states only illustrate the real difficulties that may arise out of seemingly plain statutes like subdivision 8 of Section 808, L. O. L. However, all further debate in this state is foreclosed by this court speaking through Mr. Justice BENSON in *Taggart* v. *Hunter,* 78 Or. 139 (150 Pac. 738, 152 Pac. 871), where after an exhaustive presentation by learned counsel and a careful consideration of all phases of the question it was concluded that if the writing is silent upon the amount of the commission to be paid it fails to satisfy the statute of frauds. Subdivision 8 was designed as a remedy for a twofold evil: (1) Brokers claiming commissions when they had never been authorized to sell; and (2) brokers claiming excessive rates although authorized to sell. The conclusion reached in *Taggart* v. *Hunter,* that the writing must state the amount or rate of commission to be paid is justified by the history and purpose of the statute.

5. The next question is whether the writing expresses the consideration. The fact that our statute in terms states that the consideration must be expressed is not to be taken to mean that the expression shall be different in degree from the expression required by *Wain* v. *Warlters* under the English statute. In one instance an expression of the consideration is required by the legislature and in the other it is required by the judiciary; but both demand that the consideration be "expressed." The consideration is sufficiently expressed under the English statute if it is expressly stated or if it appears by necessary inference from the terms of the writing: *James* v. *Williams,* 5 Barn. & Ad. 1109; *Raikes* v. *Todd,* 8 Ad. & E. 846. All the courts, in states having statutes which, like ours, require a writing "expressing the consideration," have given approval to writings in which the consideration appeared

by necessary inference: *Jenkins* v. *Harrison,* 66 Ala. 345, 354; *Nelson* v. *Shelby Mfg. & Imp. Co.,* 96 Ala. 515, 528 (11 South. 695, 38 Am. St. Rep. 116); *Wilson Sewing Mach. Co.* v. *Schnell,* 20 Minn. 40, 45; *Osborne* v. *Baker,* 34 Minn. 307, 311 (25 N. W. 606, 57 Am. Rep. 55); *Straight* v. *Wight,* 60 Minn. 515, 517 (63 N. W. 105); *White Sewing Mach. Co.* v. *Fowler,* 28 Nev. 94 (78 Pac. 1034); *Williams* v. *Ketchum,* 19 Wis. 231, 247; *Houghton* v. *Ely,* 26 Wis. 181, 194 (7 Am. Rep. 52); *McFarlane* v. *Wadhams,* 176 Fed. 82, 85 (99 C. C. A. 602).

In those jurisdictions where the consideration must be expressed, whether the requirement be by force of statute or by force of judicial decision, it is sufficient if the consideration appears by necessary inference: 3 Jones on Ev. 430; 20 Cyc. 266; 1 Reed on Statute of Frauds, § 429; *Henderson* v. *Lemke,* 60 Or. 363 (119 Pac. 482); *Balfour* v. *Knight,* 86 Or. 165 (167 Pac. 484, 485). See, also, *Johnston* v. *Wadsworth,* 24 Or. 494, 502 (34 Pac. 13).

A clear statement of the criterion by which to determine whether the consideration is adequately expressed is furnished in *Hawes* v. *Armstrong,* 1 Bing. N. C. 761, where the point in dispute was whether the consideration sufficiently appeared in the written memorandum. The court said:

"That such consideration does not appear expressly, and in terms, in such memorandum, is apparent on the bare inspection of the writing itself. It is not, however, necessary that such consideration should appear in express terms: It would undoubtedly be sufficient in any case, if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it, that such and no other, was the consideration upon which the undertaking was given. Not a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the

memorandum, would be sufficient to satisfy the statute; but there must be a well-grounded inference, to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise."

See also: *Wilson Sewing Mach. Co.* v. *Schnell,* 20 Minn. 40, 45; 20 Cyc. 266; 3 Jones on Ev., § 430, p. 130; Browne on Statute of Frauds (5 ed.), § 399.

Looking now to the writing signed by Crowley and applying to it the test accepted by nearly all, if not all, the authorities, it will plainly appear that the consideration is expressed in the writing. The promise is to pay a commission. For what? "For your services" is the answer given in the very words of the writing, after having first specified the services mentioned. The writing sufficiently states the consideration whether the consideration is the service rendered or the commission to be paid, for both are expressed in the writing. This action is brought upon a promise to pay money. The writing which contains the promise also contains a statement of the consideration for the promise, the services of the broker.

6. The next contention of the defendant is based upon the theory that the writing contains a mere offer and that it does not evidence an agreement. The defendant states his argument thus:

"The respondent's offer was a voluntary one, for which no consideration was given, no mutual promises were exchanged, and nothing of value passed as a consideration. The offer, therefore, was a mere *nudum pactum,* and the appellant acquired no rights by reason of it."

We may assume that in the beginning the writing only contained a promise by the land owner and that such promise did not amount to an obligation for the

reason that the broker neither paid anything to the land owner nor promised to do anything. The complaint alleges that the broker orally accepted the employment and contract; but we shall assume that the oral acceptance did not convert the promise of the owner into an obligation. In passing, however, it must be noted that there was a meeting of the minds of the parties and nothing depended upon further treaty between them; and this feature distinguishes the instant case from *Lueddemann* v. *Rudolph,* 79 Or. 249 (154 Pac. 116, 155 Pac. 172). In order to present the contention of the defendant in the strongest light possible and for the purpose of viewing it in that position we shall go a step farther and assume, without deciding, that actually entering into the employment by advertising or otherwise attempting to find a purchaser would not change the writing into a binding contract. However, the broker did more than merely try to find a purchaser; he actually produced a person who purchased; he performed the condition of the promise and the owner accepted the performance. The owner promised to pay a commission if the broker found a purchaser; the broker accepted and then performed the condition of the promise by finding a purchaser. The rule applicable to this situation is stated in 6 R. C. L. 687, thus:

"Where one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory."

Our own precedents conform with this rule and many illustrations of the doctrine can be found in the recorded opinions of other courts: *Hall* v. *Olson,* 58 Or. 464, 466 (114 Pac. 638); *Krausse* v. *Greenfield,* 61 Or. 502, 511 (123 Pac. 392, Ann. Cas. 1914B, 115); *Roberts* v. *Griswold,* 35 Vt. 496 (84 Am. Dec. 641); *Braniff* v. *Baier,* 101 Kan. 117 (165 Pac. 816, L. R. A. 1917E, 1036); *Des Moines Val. R. Co.* v. *Graff,* 27 Iowa, 99 (1 Am. Rep. 256); *Muscatine Water Co.* v. *Muscatine Lbr. Co.,* 85 Iowa, 112 (52 N. W. 108, 39 Am. St. Rep. 284); *Underwood Typewriter Co.* v. *Century Realty Co.,* 220 Mo. 522 (119 S. W. 400, 25 L. R. A. (N. S.) 1173); *L'Amoreux* v. *Gould,* 7 N. Y. 349 (57 Am. Dec. 524); *Willetts* v. *Sun Mut. Ins. Co.,* 45 N. Y. 45 (6 Am. Rep. 31); *Gurvin* v. *Cromartie,* 33 N. C. 174 (53 Am. Dec. 406); 9 Cyc. 300, 329, 333. When the broker performed the act upon which the promise was conditioned he furnished the consideration which was necessary to convert the promise to pay a commission into an obligation to pay it and thus transformed a *nudum pactum* into a binding agreement.

7, 8. The writing and the contract are not one and the same thing. While the statute makes certain agreements void and declares that no evidence, except a writing or secondary evidence of its contents, shall be available to prove such agreements, yet the statute of frauds has not added any new element to the contract itself. Whatever would be a good contract in the absence of the statute is a good contract in the presence of the statute; provided, only it is in writing and expresses the consideration. The same parties can agree upon the same terms for the same things that they could agree upon and contract for if there were no statute of frauds; but the statute simply requires the

agreement and the consideration to be in writing. Broadly stated, a writing to satisfy the statute of frauds must show the contracting parties, intelligently identify the subject matter involved, disclose the terms and conditions of the agreement, express the consideration and be signed by the party to be charged: *Catterlin* v. *Bush,* 39 Or. 496, 501 (59 Pac. 706, 65 Pac. 1064). The writing signed by Crowley meets every requirement. The parties, the owner and the broker, are named; the subject matter is sufficiently described; the terms and conditions are fully stated; every term and condition is found in the writing including the promise and the consideration for it; and the party to be charged has signed his name to the writing.

The complaint states a cause of action. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

MR. JUSTICE BURNETT concurs in the result.

Rehearing denied February 26, 1918.

ON PETITION FOR REHEARING. REHEARING DENIED.

(171 Pac. 214.)

Messrs. Angell & Fisher, for the petition.

Mr. W. B. Shively, contra.

Department 1. Mr. Justice Harris delivered the opinion of the court.

The original opinion states that the contention that the consideration is not expressed involves a determination of two questions: "(1) What is the consideration that must be expressed; and (2) when can it be said that the consideration is expressed." Before attempting to ascertain whether the consideration is expressed in the writing, the original opinion suggests three possible considerations for the promise sued upon; (1) A promise by the broker; (2) payment of money by the broker; and (3) the service to be rendered by the broker. The opinion proceeds to eliminate the first two things suggested, determines that the service rendered by the broker is the consideration, and then undertakes to ascertain whether the consideration is expressed in the writing. The petitioner now insists that the conclusion that the service of the broker is the consideration "cannot be drawn from the facts" and that it is a mere assumption. The plaintiff does not claim that the consideration for the promise of the defendant is to be found in a promise made by the plaintiff or in money paid by it. In his printed brief the respondent persistently and consistently contended that the writing was a *nudum pactum* because without consideration. For example on page 11 of respondent's brief we find the following:

"The consideration, therefore, in the instant case is that which induced the respondent Crowley to sign the offer upon which the appellant relies. If there was a monetary consideration, what was it, and from whom and to whom did it move? The complaint is silent as to this. If there was a mutual covenant or promise on the part of the Oregon Home Builders as an inducement to the respondent Crowley for making

this offer, where is the promise expressed in the writing or in the complaint? The only answer is, there was no such promise, neither is there any expressed in the writing nor any allegation in the complaint that one was made. The conclusion is, as hereinbefore stated, that this written offer was a voluntary one for which no consideration was given, and in which no consideration is expressed."

Again for the purpose of supporting his argument that the complaint is insufficient the respondent says:

"There was no financial consideration given, neither was there a covenant on behalf of the Oregon Home Builders to do or refrain from doing anything."

9. When we concluded that the consideration was not to be found in a promise made by the plaintiff or in money paid by it, we merely determined the nonexistence of what the plaintiff admitted and defendant himself contended did not exist. If it be conceded that the consideration could have been any one of the three things suggested as a possible consideration, and if it is afterwards ascertained that the writing does not express two of those possible considerations, but does express the third one then it is at least fair to conclude that the thing expressed is the consideration; and, moreover, it would be illogical to say that the thing expressed was not the consideration merely because the other two unexpressed things could have been the consideration, and when we find a consideration expressed in the writing the instrument cannot be said to be insufficient merely because some other possible consideration is not expressed. There must be some measure by which to test the sufficiency of a writing and the test is found in the rule found in Browne on St. of Frauds (5 ed.), Section 405, and quoted in the original opinion. Applying this rule to

the writing it is obvious that Crowley's promise to pay a commission was designed to procure the rendition of the service which the plaintiff did render and hence the service "so stipulated for by the defendant, is taken to be the inducement to his promise."

10. The petitioner insists that "there is no specific statement anywhere in the writing stating what the consideration is for Crowley's promise." Although the consideration must be expressed it need not be formally and precisely expressed. In every jurisdiction, it is held that the consideration is expressed if it appears by necessary inference. In every one of the states having a statute requiring the expression of the consideration it is the established rule that the statute is satisfied if the consideration appears by necessary inference; and so, too, where an expression of the consideration is required by force of judicial decision the requirement is fulfilled if the consideration appears by necessary inference. The courts have differed upon many questions arising out of the statute of frauds, but upon this question all jurisdictions are agreed. The rule that the consideration is sufficiently expressed if it appears by necessary inference was employed by this court when trying to find a consideration for the writing involved in *Corbitt* v. *Salem Gaslight Co.*, 6 Or. 405, 408 (25 Am. Rep. 541); it was recognized again in *Johnston* v. *Wadsworth*, 24 Or. 494, 503 (34 Pac. 13); it was indubitably adopted and squarely applied in *Henderson* v. *Lemke*, 60 Or. 363, 365 (119 Pac. 482); and it was again applied in the original opinion in the instant case. This rule has been applied for more than a century, is accepted everywhere without protest or dissent, and is thoroughly established in our jurisprudence. Indeed, if there is any departure anywhere from the rule ap-

plied in the original opinion it is one of relaxation rather than restriction, for the language of many cases is more liberal that the language employed in the instant case.

11. The defendant takes the position that the oral acceptance by the plaintiff "was void under the statute of frauds and no proof could be offered thereon." The law is stated in 20 Cyc. 254, thus:

"A written offer may constitute a sufficient memorandum of the contract to charge the party making it if later accepted by parol": See, also, Browne on St. of Frauds (5 ed.), § 345a.

The original opinion is not out of joint with *Lueddemann* v. *Rudolf,* 70 Or. 249 (154 Pac. 116, 155 Pac. 172); nor is it in conflict with *Great Western Land Co.* v. *Waite, ante,* p. 488 (168 Pac. 927, 171 Pac. 193). In the former case the writings disclosed nothing "but fruitless negotiation"; and in the latter the plaintiff was without any writing, signed by the party to be charged, showing a hiring. In neither of these cases did the minds of the parties meet upon an offer made by one and accepted by the other. In the instant case the minds of the parties did meet. The written offer was accepted and after being accepted the condition of the promise was performed. The writing signed by the party to be charged names both parties, describes the subject matter, states the promise, and prescribes the condition upon which the promise is made. Having accepted the written offer and performed the condition, the plaintiff is in a position to compel payment because the writing contains every element necessary to satisfy the statute. The petition for a rehearing is denied. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

MR. JUSTICE BURNETT delivered the following opinion, concurring specially:

In the petition for rehearing in this case counsel for defendant indulge in some criticism of the language used in the opinion by Mr. Justice HARRIS, here quoted:

"The consideration for the promise upon which this action is brought cannot be said to be a promise made by the plaintiff or money paid by it, because the writing does not state nor is it claimed that the plaintiff gave a promise or paid money for the promise of the defendant."

The critique is aimed at and can apply only to the method of the argument by the process of exclusion centering finally upon the construction of the only writing adduced in evidence.

We must all agree that in this case the crucial question is whether the writing of October 26, 1915, quoted at large in the former opinion is sufficient within the statute of frauds to charge the defendant who signed the same. All other questions aside, the controversy narrows down to whether there is an expression in that instrument of the consideration necessary to support the same. Explicitly declaring to the plaintiff to whom the writing was addressed that it is employed and authorized to offer the realty described in the mortgage for sale and to accept a deposit to be applied to the purchase price, the defendant states in so many words:

"In the event that you find a buyer ready and willing to consummate a deal for said price and terms or on such further terms and price as may be agreed to by me or place me in touch with a buyer to whom I at any subsequent time sell or convey said property I will agree to pay you in cash as a commission for your services the following sums," describing the percentage to be paid.

"To express" in the sense used by the statute is "to set forth or manifest to the observation or understanding especially by written or spoken language": Standard Dictionary, title "Express." Webster gives the following definition: "To represent in words; to state; utter; hence to make known or manifest; to give or convey a true impression of." The Century Dictionary defines it thus: "To make known in any way, but especially by spoken or written words." In the excerpt quoted from the instrument which the defendant signed he conveys to the understanding by his written language the thing which induced him to sign the document to consummate a deal for the stated price and terms. In effect he says to the plaintiff: "Your finding a buyer, etc., induces me to sign this writing by which I bind myself to pay you money for your services to be rendered in the respect I have described." The fault in the argument of the defendant seems to be that he thinks the consideration required must be a present consideration; either the concurrent payment of money or a promise coincident in time with the making of the agreement signed by the defendant. It is true that a past consideration *is not,* while on the other hand present consideration *is* competent to sustain an agreement; and it is likewise true that a condition to be performed in the future is a consideration efficient in the support of a present contract. If the future condition is not performed the contract lapses, not because it was void *ab initio* but because the consideration fails, thus releasing the promisor.

It is plain here what moved the defendant to sign the writing upon which he is charged and this moving cause is delineated by the very language of the instrument itself constituting an expression of the con-

sideration within the meaning of the statute. *Lueddemann* v. *Rudolf*, 79 Or. 249 (154 Pac. 116, 155 Pac. 172), was decided chiefly on the principle that the correspondence did not amount to a contract by offer and acceptance; that "throughout the whole correspondence there is never a point where one party says 'I offer this,' and the other party replies 'I accept it.'" It is not an authority controlling the present issue. Neither is *Great Western Land Co* v. *Waite, ante*, p. 488 (168 Pac. 927, 171 Pac. 193), a parallel case with the one in hand; for in that instance there was no expression of anything which could be counted upon either presently on in the future as an inducement to the defendant to sign the writing upon which the plaintiff sought to charge him.

Argued February 13, reversed and remanded February 26, 1918.

ANGUS *v.* HOLBROOKE.

(170 Pac. 1179.)

Mortgages—Absolute Deed.

1. Giving a deed to secure a debt, and receiving an agreement to reconvey on payment of the debt, make the transaction a mortgage, although the giving of a deed in satisfaction of a debt, and at the same time receiving an agreement to convey, would not constitute a mortgage.

Mortgages—Injury to Premises—Action—Tender.

2. Where plaintiffs deeded land to secure a debt, and defendant agreed to reconvey the land in the condition in which received, it was not necessary to make a tender before suit for damages, where defendant had committed waste and refused to restore it when demanded under the terms of the contract.

[As to duties and liabilities of mortgagee in possession, see note in 4 **Am. St. Rep.** 69.]

From Hood River: WILLIAM L. BRADSHAW, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

The substance of the complaint in this action to recover damages for breach of contract is that, prior to January 18, 1915, plaintiff was the owner and in possession of certain real property in Hood River County. On the date mentioned the defendant Helen B. Holbrooke was the assignee of two mortgages which were liens upon the property in question to secure an aggregate indebtedness of about $9,000. In order to avoid the expense of a legal foreclosure and to further secure the creditor, the plaintiff conveyed the premises to defendant Helen B. Holbrooke and received from defendant a written agreement to the effect that they would preserve the interests of plaintiff in the property and reconvey the same to him or his assigns on or before January 19, 1916, on payment to them of the sum of $9,489.62, with interest and taxes; and that this contract contained the following covenant:

"And we further agree that in case of purchase by said Angus under the terms of this option the premises will be delivered to him or his assignee in the same condition the same are now in, excepting fire, acts of God or other unavoidable casualties over which we have no control. * * It is further understood that no timber shall be cut upon the premises herein mentioned during the term of this option."

It is then alleged that under the provisions of the contract plaintiff delivered possession of the premises on March 1, 1915, and that thereafter defendants disregarded the terms of the agreement, committing willful waste, tearing down and removing buildings, altering the dwelling-house, digging up and removing water-pipes, cutting timber, etc. It is then alleged that in the month of October, 1915, plaintiff found a purchaser ready, able and willing to buy the property,

and entered into a contract to secure possession thereof and to deliver the same to the purchaser in first-class condition; that the prospective buyer inspected the premises, discovered the acts of waste and declined to complete the purchase unless the premises were restored to their former condition; that plaintiff made demand upon defendants to restore the premises to the condition in which they were when the conveyance was made to them, which they refused to do; that plaintiff thereby lost his opportunity to sell and was unable to find another purchaser; and that the time of redemption has expired. Plaintiff alleges damages in the sum of $4,000. Defendants demurred to the complaint and, the demurrer being sustained, plaintiff elected to stand upon his pleading and a judgment was rendered for defendants from which this appeal is taken. REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Littlefield & Maguire,* with an oral argument by *Mr. Robert Maguire.*

For respondents there was a brief over the name of *Messrs. Stearns & Derby,* with an oral argument by *Mr. A. J. Derby.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. The attack upon the sufficiency of the complaint is based upon the fact that the complaint contains no tender or offer of performance on the part of plaintiff and no allegation of election to purchase under the option pleaded. Plaintiff urges that the conveyance of January 18, 1915, and the option to repurchase when construed together, as they should be, constitute a

mortgage, while defendants insist that the deed and the option are two entirely independent contracts and that the present action is based exclusively on the latter. The test of a contract whereby a mortgage is to be distinguished from a deed not only absolute in form, but also in effect, appears to be that if the conveyance is intended by the parties to be as security for a debt, the instrument is in equity a mortgage: 1 Jones on Mortgages (6 ed.), Section 264. Of course we do not wish to be understood as saying that if a deed is taken in *satisfaction* of a debt, and a written agreement to reconvey is given at the same time, that the two writings would constitute a mortgage, for they would not. The complaint in the present case expressly declares that the deed to Helen B. Holbrooke was executed to secure a debt and that the instrument, which was executed at the same time, agreed to protect plaintiff's interest in the property. These allegations recite facts which make the transaction a mortgage.

2. The contention of defendants as to the absence of a plea of offer to perform as a prerequisite to his right of action herein, is fully answered in the able opinion of Mr. Justice MOORE, in *Eldriedge* v. *Hoefer*, 52 Or. 241, 256 (93 Pac. 246, 94 Pac. 563, 96 Pac. 1105), wherein it is said that:

"The rules of law do not impose upon a party to a suit or action the performance of vain things, as a condition precedent to the enforcement of a right; and when the plaintiff averred that he notified the defendants of the alleged offer for the land, and that he would pay them the sum which he admitted to be due, if they would permit him to redeem the premises from their lien, and they refused to comply therewith, the complaint stated facts sufficient to entitle the plaintiff to the equitable relief which he sought, without al-

leging a tender or an offer to pay the sum conceded by him to be due to the defendants."

In the instant case the complaint alleges waste and a demand upon defendants that they restore the property to the condition in which it was when received by them, preparatory to delivery under the terms of their contract, which they refused to do. This, we think, constituted a waiver of an offer to perform.

We conclude that the complaint states a cause of action and the judgment will be reversed and the case is remanded with direction to overrule the demurrer.

REVERSED AND REMANDED WITH DIRECTIONS.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued February 6, affirmed February 26, 1918.

WEBSTER v. ROGERS.

(171 Pac. 197.)

Execution—Execution Sale—Delivery of Deed.

1. Under the Oregon practice a sale on execution partakes of the character of a judicial sale. The right of a purchaser at such a sale to a sheriff's deed is not lost by the expiration of the time within which a second execution could issue on the judgment.

Execution—Acquiring Land at Judicial Sale.

2. It was not fraudulent for a mortgagee of land, who on account of a great number of judgment liens did not desire to foreclose at great expense, to induce a judgment creditor to issue an execution and sell the land, and to buy the land at the sale.

Reformation of Instruments—Mortgages—Foreclosure.

3. A mortgage given as security for an accommodation "note to F. and B.," whereas the note was in favor of W. O., executed at the F. and B. Bank, evidencing a loan made through the good offices of the bank, could be reformed in a foreclosure against the accommodated party.

[As to reformation of bills and notes, see note in 65 Am. St. Rep. 519.]

Tenancy in Common—Mortgage by One to Another—Who may Purchase at Foreclosure.

4. Where a tenant in common mortgages his interest to another tenant in common, the latter can buy at a foreclosure sale.

Tenancy in Common—Buying Interest of Another at Judicial Sale.

5. A tenant in common can buy the interest of another tenant at a public sale under execution without being charged as a trustee for such tenant, although he would be a trustee if he bought an outstanding hostile title.

Tenancy in Common — Judicial Sales — Adequacy of Consideration — Evidence.

6. Evidence *held* to warrant a finding that a tenant in common did not buy the interest of another tenant at a judicial sale at an inadequate price.

Execution—Sales—Action to Set Aside—Laches.

7. Where the interest of a tenant in common in real property is encumbered with judgment liens in excess of its value, and where such tenant stands by for eighteen years after his cotenant has purchased the former's moiety at execution sale, the purchaser paying all taxes and street improvements and constructing a valuable building on the land, the former will not be heard to attack the execution sale after the expiration of the liens of the judgment with which the property is encumbered. A suit making such an attack on his behalf is barred by laches.

From Coos: GEORGE F. SKIPWORTH, Judge.

Department 2. Statement by MR. JUSTICE MCCAMANT.

In 1890 the defendant S. C. Rogers and W. G. Webster contracted for the purchase of Lots 2, 3, 6 and 7 in Block 2 of E. B. Dean & Company's Second Addition to Marshfield. A deed in their favor was executed December 1, 1892; they held the property as tenants in common. Webster's interest in the property immediately became subject to a number of liens. The first of these was a mortgage he gave the defendant Rogers May 14, 1891, to secure the latter on an indorsement of a $500 note which Rogers signed for the accommodation of Webster. The second of them was a judgment in the sum of $399.50 recovered against Webster by Eichold and Miller October 3, 1892. Sundry other judgments were docketed against Webster in 1892 and still others were recovered later.

Webster paid the interest on the note indorsed by Rogers until May 13, 1894. Thereafter he made no

payments and on December 18, 1894, Rogers was obliged to meet the note, paying the sum of $529.25. From the time when the contract of purchase was made in 1890 Rogers had paid all the taxes and other charges incident to carrying the property. By 1896 Webster was in his debt to the amount of $200 additional on these accounts. In 1895 Webster left Oregon, acquired a residence in Arizona and remained there until his death on October 7, 1904. He was hopelessly insolvent when he left this state. The plaintiff Walter H. Webster is his son and the plaintiff Alma Webster is his granddaughter. They, with Annie Webster, his widow, are his heirs at law.

In the spring of 1896 the defendant Rogers consulted Mr. J. W. Bennett of the Coos County bar with a view to the foreclosure of his mortgage. Mr. Bennett advised him that so many judgments had been docketed against Webster that the foreclosure of the mortgage would be expensive and burdensome. Mr. Bennett suggested a sale of the property under the Eichold and Miller judgment which Bennett had secured. Rogers acceded to this suggestion. An execution was sued out, the property was regularly advertised in the newspaper which published notices of all sheriff's sales and on May 14, 1896, the interest of Webster in these lots was purchased by Frank Rogers in trust for S. C. Rogers for $40. The sale was reported to the court and was confirmed October 13, 1896.

Thereafter S. C. Rogers exercised dominion over the property. The lots were used for the storage of lumber and stone, permission for such use being given by the defendant S. C. Rogers, who continued to pay the taxes. He also paid a heavy municipal lien for a street improvement.

A sheriff's deed in favor of Frank Rogers was executed October 29, 1906, and he conveyed the property to S. C. Rogers. On January 11, 1904, S. C. Rogers acquired title to Lots 1 and 8 in the same block and in June, 1906, he began the construction of a two-story building which was completed the following year at a cost of $10,000 and which covers the lots purchased in 1904 as well as those in dispute in this case. Since then this defendant has been in the actual and exclusive possession of the property.

Annie Webster conveyed her dower right to S. C. Rogers September 17, 1912, for a consideration of $25.

On May 28, 1915, plaintiffs filed their complaint alleging that they are the owners of the property and praying that the sheriff's deed to Frank Rogers be set aside as a cloud upon their title. It will not be necessary to review the pleadings, it is enough to say that they were sufficient to present the questions on which the case turns.

The Circuit Court dismissed the complaint and plaintiffs appeal. AFFIRMED.

For appellants there was a brief over the names of *Mr. Woodson T. Slater* and *Messrs. Stoll & Hodge,* with an oral argument by *Mr. Slater.*

For respondents there was a brief over the names of *Mr. A. J. Sherwood, Mr. Lawrence A. Liljeqvist* and *Messrs. Bennett, Swanton & Bennett,* with an oral argument by *Mr. Sherwood.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

Plaintiffs rely chiefly on the fact that the sheriff's deed was not issued to Frank Rogers until October 29, 1906. The sale was made on an execution based on

a judgment recovered October 3, 1892. The execution was issued March 11, 1896. A period of more than ten years elapsed between the date of this execution and the date of the sheriff's deed; it appears that no further executions were issued in the interim. Section 241, B. & C. Code, then in force and since repealed, was as follows:

"If, at any time after the entry of judgment, a period of ten consecutive years shall have elapsed without an execution being issued on such judgment during such period, no execution shall thereafter issue on such judgment, and such judgment shall thereafter be conclusively presumed to be paid and satisfied unless an execution be issued thereon within one year from the passage of this act."

1. Plaintiffs contend that a sheriff's deed cannot lawfully issue after the judgment on which it is based has lost its vitality. We are cited to a long line of authority to the effect that a valid sale cannot be made under an execution issued on a dead judgment. Plaintiffs cite the following cases in support of their ultimate contention that when the life of a judgment ends a sheriff's deed cannot thereafter issue to consummate a sale made while the judgment was effective: *Dixon* v. *Dixon,* 89 App. Div. 603 (85 N. Y. Supp. 609); *Middlesboro Waterworks* v. *Neal,* 105 Ky. 586 (49 S. W. 428); *McCall* v. *White,* 73 Ala. 562; *Rucker* v. *Dooley,* 49 Ill. 377 (95 Am. Dec. 614); *Harmon* v. *Larned,* 58 Ill. 167, 169; *Cottingham* v. *Springer,* 88 Ill. 90; *Peterson* v. *Emmerson,* 135 Ill. 55 (25 N. E. 842); *Rann* v. *McTiernan,* 187 Ill. 193 (58 N. E. 390); *Bradley* v. *Lightcap,* 202 Ill. 154 (67 N. E. 45).

The later Illinois cases do not tend to support plaintiffs' contention, because they are based wholly on an Illinois statute which forbids the execution of a

sheriff's deed after the lapse of five years from the expiration of the period of redemption. The authority of the earlier Illinois cases is destroyed for the purposes of this case by the decision in *Cottingham* v. *Springer,* 88 Ill. 90, 96, 97. This case squarely holds that objection to a sheriff's deed on the ground here asserted is available only to an innocent purchaser from the execution defendant; it cannot be urged by his heirs.

The Alabama case holds that when a sheriff's deed is applied for ten years after the sale, in the absence of evidence that the purchaser has been in possession, an explanation of the delay should be offered. The doctrine of this case does not help plaintiffs. It abundantly appears that all acts of dominion over the property in dispute were exercised by S. C. Rogers at all times after the sheriff's sale and that when the sheriff's deed was secured his possession was actual, hostile and complete.

As we read the Kentucky case it does not hold that a sheriff's deed must be executed during the life of the judgment under which the sale is made. In that case the sale was made in 1853; there was no satisfactory proof that the purchase price had ever been paid; the defendant in the writ continued to live on the land for seven years after the sale; the plaintiff in the writ lived in the immediate neighborhood and must have known of the occupancy of the land; it was doubtful if the purchaser had ever been in possession, but if so, he had given up possession prior to the Civil War; the sheriff's deed was executed in 1894, forty-one years after the sale. It was held that a conclusive presumption should be indulged that the debtor had redeemed from the sale.

The case of *Dixon* v. *Dixon,* 89 App. Div. 603, 607–609 (85 N. Y. Supp. 609), turns largely on the fact that the deed was executed forty-three years after the sale. The opinion lays some emphasis on the expiration of the lien of the judgment before the issuance of the deed. Under the laws of New York in force at the time when this sale was made there was no requirement that the sheriff should report his proceedings, nor was any provision made for confirmation: Vol. 3, Rev. Stats. N. Y. (5 ed.), pp. 651–655. The sale which took place was an execution, as distinguished from a judicial, sale. If such a sale is made in violation of law, the title of the defendant is not disturbed and the judgment of plaintiff is not impaired. There is no provision for curing the defects by an order of confirmation passed after the expiration of a period allowed for exceptions to the regularity of the sale. Under the Oregon statute a sale on execution partakes of the character of a judicial sale. It must be reported to the court; it becomes effective to start the period of redemption only when it is confirmed. The Oregon statute allows a time after the filing of the report of sale within which any party interested may call the attention of the court to irregularities in the sale. The confirmation of the sale is an acceptance by the court of the bid of the purchaser. The judgment debtor is credited with the amount of the bid; if he redeems the effect of the sale is abrogated, but the judgment stands satisfied in whole or in part in accordance with the price for which the property is sold. In any event the judgment is satisfied to the extent of the purchase price. The rights of the purchaser are based on the price paid for the property and credited on the judgment. In the event of redemption the purchaser receives this

sum with interest. He is not concerned with the remainder of the judgment debt and we cannot see why the expiration of its lien should affect his right to a sheriff's deed. As to the distinction between execution and judicial sales, see 17 Am. & Eng. Enc. Law (2 ed.), 956; Rorer on Judicial Sales (2 ed.), 247; *Noland* v. *Barrett,* 122 Mo. 181 (26 S. W. 692).

In *Talbot* v. *Cook,* 57 Or. 535, 538 (112 Pac. 709), Mr. Justice BURNETT discusses *Dixon* v. *Dixon,* 89 App. Div. 603 (85 N. Y. Supp. 609), and distinguishes the New York law from the Oregon law on another ground which is conclusive of this branch of the controversy. His opinion states:

"No limitation is expressly provided by our Code against the time within which a sheriff may execute a deed to the purchaser at a foreclosure sale."

The statute in force when the sheriff's deed to Frank Rogers was executed, Section 1035, B. & C. Code, is as follows:

"The former sheriff shall return all process, whether before or after judgment or decree, which he has fully executed, and shall complete the execution of all final process which he has begun to execute: Provided, that in all cases where real property has been or may be sold under execution by any sheriff, and he shall fail or neglect during his term of office, by virtue of the expiration thereof, or otherwise, to make or execute a proper sheriff's deed conveying said property to the purchaser; or if through mistake in its execution, or otherwise, any sheriff's deed shall be inoperative, the sheriff in office at any time after such purchaser shall be entitled to a deed shall execute such conveyance, and such conveyance so executed shall have the same force and effect as if made by the sheriff who made the sale."

A fair construction of this statute negatives this contention of plaintiffs. The sheriff is required to

execute the conveyance "at any time after such purchaser shall be entitled to a deed." To hold that the purchaser's right to a deed expires with the lien of the judgment under which the property is sold would be to read into the statute words which the legislature has not written there and to disregard the legislative intent manifested by the language above quoted.

2. Plaintiffs' charges of fraud are not borne out by the evidence. The sale took place at a time when Webster had left the state and abandoned all intention of settling with his creditors. He had executed eight mortgages for sums aggregating $13,006.13. Six of these mortgages had been foreclosed prior to the time when defendants purchased the property in dispute. S. C. Rogers had been more lenient than most of Webster's creditors. Webster's interest in the property in dispute was subject to the lien of the Rogers mortgage for $500 and to the lien of twelve judgments aggregating $7,038.10. No witness gives the property such a value as to allow Webster any beneficial interest in it over and above these liens. The preponderance of the testimony shows that Webster's half of the property was worth far less than the liens with which it was encumbered. Rogers had paid all taxes levied from 1890 to 1896. He was carrying Webster for $200 in excess of the mortgage debt. He was entitled to a settlement.

Mr. Bennett is not subject to criticism for suggesting a sale under the Eichold and Miller judgment in lieu of the burdensone and expensive remedy of foreclosure. The result was a credit to Eichold and Miller of $13.75 in excess of the expenses of sale. The Rogers mortgage was the first lien on the land. The Eichold and Miller judgment was an honest debt. The proceeding was not collusive, but was an effort of a

patient creditor to make some salvage on an indebtedness which would have been wholly lost in the absence of affirmative action on his part. The proceedings were strictly in accord with the statute. The case has nothing in common with *Conklin* v. *La Dow,* 33 Or. 354 (54 Pac. 218).

3. It is argued that Webster's mortgage to S. C. Rogers was defective in that it described the accommodation note signed by Rogers as "a note to Flanagan & Bennett," whereas it was a note in favor of Walter Oldland executed at the Flanagan & Bennett bank evidencing a loan made through the good offices of the bank. The mortgage gave the date, amount and maturity of the note correctly; it recited that Rogers signed the note as "security" for Webster. It is doubtful if this mortgage can be said to be defective under plaintiff's authorities: See *New* v. *Sailors,* 114 Ind. 407, 410 (16 N. E. 609, 5 Am. St. Rep. 632); *Bowen* v. *Ratcliff,* 140 Ind. 393, 397 (39 N. E. 860, 49 Am. St. Rep. 203). In any event the mortgage could have been reformed as against Webster in a foreclosure suit: *Bramhall* v. *Flood,* 41 Conn. 68.

4, 5. It is suggested that Rogers as the tenant in common of Webster was disqualified from purchasing. By mortgaging his interest in the property to Rogers, Webster consented that Rogers might buy at a foreclosure sale: *Twin Lick Co.* v. *Marbury,* 91 U. S. 587, 590 (23 L. Ed. 328); *In re Gaslight Co. Cases* (*Rawlings* v. *New Memphis Gaslight Co.*), 105 Tenn. 268 (60 S. W. 206, 214, 80 Am. St. Rep. 880); *Preston* v. *Loughran,* 58 Hun (N. Y.), 210, 215 (12 N. Y. Supp. 313). His right to buy at a sale under an execution to which he was a stranger is even clearer: *Fiske* v. *Sarber,* 6 Watts & S. (Pa.) 18; *Allen* v. *Gillette,* 127 U. S. 589, 596 (32 L. Ed. 271, 8 Sup. Ct. Rep. 1331).

While a tenant in common will be charged as a trustee if he purchases an outstanding hostile title, the weight of authority entitles him to buy the moiety of his cotenant at a public sale thereof under legal process running against the property of the cotenant: Freeman on Cotenancy and Partition (2 ed.), 165; *Baird* v. *Baird's Heirs,* 21 N. C. 524 (31 Am. Dec. 399); *McNutt* v. *Nuevo Land Co.,* 167 Cal. 459, 466, 467 (140 Pac. 6); *Starkweather* v. *Jenner,* 216 U. S. 524, 528 (54 L. Ed. 602, 30 Sup. Ct. Rep. 382).

6. Plaintiffs attack the sale on the ground of inadequacy of price. It appears that Webster paid $2,400 for his interest in the lots in controversy. They were purchased during a boom, at a time when real estate sold readily. In 1896, when the defendants purchased at sheriff's sale, the boom had flattened out and property was unsalable except at prices which were a small fraction of former values. There is testimony that those who were not obliged to sell continued to value their property at the same prices as before the depression, but the adequacy of the price obtained at a judicial sale is to be tested by comparison with prices paid for like property at sales made at or about the same time. The property sold by the sheriff was subject to the lien of the Rogers mortgage; on the day of sale the mortgage debt amounted to $603.58. The lots sold subject to this encumbrance for $40. A previous execution against Webster had been returned *nulla bona;* counsel who controlled this execution testified that he did not think the lots were worth the amount of the mortgage, and for this reason refrained from levying upon them. S. C. Rogers testified that he was willing to bid a larger sum than that for which the property was struck off and sold. This circumstance cannot be permitted to defeat the sale; if the

rule were otherwise, sales at public auction would be a precarious source of title. Plaintiffs have produced a number of witnesses who appraise the property at the time of sale at sums largely in excess of the price paid and defendant offers evidence to show that Webster's equity of redemption had no value. The lower court found in accordance with this latter testimony that Webster's half interest in the property did not exceed $400 in value. It is sufficient for present purposes to say that the inadequacy of price, if any, was not gross. Plaintiffs are not entitled to relief on this ground: *Farmers' Loan Co.* v. *Oregon Pacific R. R. Co.*, 28 Or. 44, 69, 70 (40 Pac. 1089); *Nodine* v. *Richmond*, 48 Or. 527, 544 (87 Pac. 775). We do not intend to decide that after the confirmation of a sale it is competent for the defendant in the writ or his successor in interest to attack the sale on the ground of inadequacy of price. That the order of confirmation concludes this question is intimated in *Leinenweber* v. *Brown*, 24 Or. 548, 552 (34 Pac. 475, 38 Pac. 4).

7. The defense of laches asserted by the defendants is clearly made out. Plaintiffs and their predecessor in interest have paid no part of the taxes since the land was purchased in 1890. A street assessment of $1,008 was paid by S. C. Rogers. The plaintiff Walter H. Webster resided in Marshfield until 1898. He knew the condition of the real estate market and must have known that at the time of the sale his father had no beneficial interest in the property. No one could think that at that time his father's interest in the property was worth the amount of the liens with which it was encumbered. He stood by until these liens were outlawed and until nine years after S. C. Rogers had constructed a valuable building on the property.

The front of this building is situate on lots in which plaintiffs assert no interest. If they were to prevail in this suit they would be entitled to a half interest in the lots on which the rear portion of the building is constructed. The complaint was filed nineteen years after the sale. In the meantime the business section of Marshfield had shifted, the population had increased and the property had acquired a value it did not possess in 1896. In the ten years intervening between the sheriff's sale and the construction of the building, the possession of S. C. Rogers fell short of the requirements of the law of adverse possession, but he exercised dominion over the property from time to time. There were open and visible marks of this dominion, notice of which is chargeable to these plaintiffs and their ancestor. Within the principles of the law of laches as expounded by Mr. Justice WOLVERTON in *Raymond* v. *Flavel,* 27 Or. 219, 238 (40 Pac. 158), by Mr. Justice MOORE in *Loomis* v. *Rosenthal,* 34 Or. 585, 600–603 (57 Pac. 55), and as applied by Mr. Justice BEAN in *Crowley* v. *Grant,* 63 Or. 212, 221 (127 Pac. 28), plaintiffs' claim is stale and it would be most inequitable to adjudge them the owners of a half interest in this property. If the defense of equitable confirmation had been pleaded, the case would fall within the doctrine of *Mascall* v. *Murray,* 76 Or. 637, 651 (149 Pac. 517). Plaintiffs' right to litigate this controversy in a court of equity has not been challenged and this opinion must not be construed as adjudging that such right exists.

The decree of the lower court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued December 20, 1917, modified January 22, rehearing denied March 5, 1918.

DEPOT REALTY SYNDICATE *v.* ENTERPRISE BREWING CO.*

(170 Pac. 294; 171 Pac. 223.)

Corporations—Guaranty of Lease of Customer.

1. A brewing corporation can legally guarantee the performance of any condition in a lease to a saloon-keeper who stipulates exclusively to sell such corporation's beer.

Guaranty—Liability of Guarantor—Landlord and Tenant.

2. An indorsement on a lease, "for valuable consideration we hereby guarantee the faithful performance by the above lessees of all their obligations," makes the obligation joint and several, and the landlord can sue the guarantor for rent without making effort to collect from the lessee.

Corporations — Acts of Officers Beyond Authority — Ratification — Silence.

3. Where an agent for a brewing corporation guarantees payment of rent by a saloon-keeper without authority, but the landlord writes the officers of the corporation as to the fact, asking if it is all right, silence on the part of the brewing company renders it liable for subsequently accruing rent, but not for prior rent, it being the duty of the principal to immediately deny the authority of the agent if it desires not to be bound.

Corporations—Powers of Managing Officers—Contracts of Guaranty.

4. The managing officers of a brewing corporation have the power to authorize an agent to guarantee the conditions in leases to saloon-keepers, or to ratify such a guaranty, without a resolution of the directors; such officers of a corporation having power coextensive with those of the principal, except as to matters over which the stockholders alone have control, and power to adopt any reasonable means that might tend to advance the interests of the corporation.

Corporations — Guaranty — Authority of Agent — Sufficiency of Evidence.

5. Evidence *held* insufficient to support a finding that a state agent for a brewing corporation had authority to guarantee payment of rent by a saloon-keeper to a landlord.

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*On power of corporation organized for the manufacture and sale of liquor to enter into contracts of guaranty or suretyship on behalf of its customers, or prospective customers, see note in 27 **L. R. A. (N. S.)** 186. REPORTER.

ON PETITION FOR REHEARING.

Estoppel—Equitable Estoppel—Silence.

6. One is usually required to hastily refute oral declarations, made in his presence, affecting him injuriously, but this does not generally apply to letters, except where acted upon or invited.

[As to silence as ratification of act of strangers, see note in **Ann. Cas.** 1912B, 151.]

Principal and Agent—Unauthorized Acts of Agent—Silence of Principal—Ratification.

7. Where unauthorized contract of agent is brought to the knowledge of the principal, either orally or by letter, the principal must hastily disavow it or he will be held to have ratified it, and particularly so if the failure to do so might impose loss or injury upon the other party.

[As to liability of principal for unauthorized act of agent, see notes in 22 **Am. St. Rep.** 189; 88 **Am. St. Rep.** 779.]

Principal and Agent—"Ratification" of Contract—"Estoppel in Pais."

8. A clear distinction exists between ratification of contract by a principal and estoppel *in pais;* ratification following the unauthorized act, and estoppel being based on principal's inducement to another to act to his prejudice.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is an action by the Depot Realty Syndicate, an Oregon corporation, against the Enterprise Brewing Company, a California corporation doing business in this state, to recover $1,450 as arrears of rent reserved in a lease executed by the plaintiff to John Ralson, the payment of which sum is alleged to have been guaranteed by the defendant. A demurrer to the initiatory pleading on the ground that it did not state facts sufficient to constitute a cause of action having been overruled, an answer was filed denying the material averments of the complaint. The cause was tried without the intervention of a jury and when the plaintiff had introduced its evidence and rested, a motion for a judgment of nonsuit was interposed and denied. The defendant's counsel then declined to offer any evidence, whereupon findings of fact and law were made

in conformity with the averments of the complaint, and based thereon a judgment was rendered as demanded therein and the defendant appeals. MODIFIED.

For appellant there was a brief over the name of *Messrs. Dolph, Mallory, Simon & Gearin,* with an oral argument by *Mr. Joseph Simon.*

For respondent there was a brief over the names of *Messrs. Wood, Montague & Hunt* and *Mr. Donald M. Graham,* with an oral argument by *Mr. Richard W. Montague.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended that though the defendant may have been benefited by the contract which forms the basis of this action, a corporation cannot legally guarantee the performance of any condition, and for that reason an error was committed in overruling the demurrer. It is conceded that the defendant is engaged at San Francisco, California, in manufacturing beer, which product is disposed of at wholesale to saloonkeepers the payment of whose rent has, in some instances, been guaranteed by the officers of the corporation. The general rule that an ordinary corporation cannot become a surety is subject to the well-recognized exception that such legal entity has implied power and may encourage legitimate undertakings by advancing money, extending credit, or becoming surety for any of its independent agencies, when by doing so it is reasonably expected that the business in which the corporation is engaged will be advanced by such appropriate means: 3 Thompson, Corp. (2 ed.), § 2207. Thus in *Winterfield* v. *Cream City Brewing Co.,* 96 Wis. 239 (71 N. W. 101), a headnote reads: "It is not

ultra vires for a corporation organized to make and sell beer to guarantee the rent of a customer." To the same effect see *Timm* v. *Grand Rapids Brewing Co.*, 160 Mich. 371 (125 N. W. 357, 27 L. R. A. (N. S.) 186); *Blue Island Brewing Co.* v. *Fraatz*, 123 Ill. App. 26; *Holm* v. *Claus Lipsius Brewing Co.*, 21 App. Div. 204 (47 N. Y. Supp. 518); *H. Koehler & Co.* v. *Reinheimer*, 26 App. Div. 1 (49 N. Y. Supp. 755); *Horst* v. *Lewis*, 71 Neb. 365 (98 N. W. 1046, 103 N. W. 460).

The securing of saloon-keepers who would stipulate exclusively to sell the defendant's beer tended to expand its competition and enhance the scope of its business, and this being so, the corporation could lawfully guarantee the payment of rent of buildings occupied by its customers while keeping the terms of such agreement. No error was committed as to the rule invoked in this particular.

2, 3. It is maintained that the alleged guaranty is not an undertaking for the payment of another's debt, but is in effect a contract for indemnity merely, which obligation is collateral and no liability attaches until an effort has been made to collect from the principal, and since the complaint contains no averments in respect to such matter, an error was committed in overruling the demurrer. A text-writer in discussing this subject remarks:

"When, by the terms of the contract, the obligation of the surety or guarantor is the same as that of the principal, then, as soon as the principal is in default, the surety or guarantor is likewise in default, and may be sued immediately and before any proceedings are had against the principal": Brandt, Suretyship Guaranty (3 ed.), § 110.

Thus in *Redfield* v. *Haight*, 27 Conn. 31, the defendant's son signed a writing as follows:

"And the said Joseph Haight hereby further agrees, in consideration of the premises, to assume, and does hereby assume, the payment of the liabilities and debts of the firm of Redfield & Haight,—that is, the liabilities of the said firm contracted for goods, wares, and merchandise for said business, and the liabilities and debts of the said Edwin Redfield, contracted and incurred for goods for the said business so conducted by him alone, a schedule of which debts and liabilities is hereto annexed."

To this contract was appended, upon the same paper, a memorandum upon which the suit was brought as follows:

"In consideration of one dollar, to me in hand paid, I hereby guarantee the full and fair performance of the covenants and agreements mentioned in the foregoing instrument on the part of Joseph Haight.

"Dated August 8, 1854.

"DESIRE W. HAIGHT."

It was held that the defendant's contract was not a mere indemnity, but an absolute guaranty, and that upon the breach of the principal's agreement the obligee could immediately maintain an action against the guarantor.

In *Garey* v. *Hignutt,* 32 Md. 552, it was ruled that a creditor was not required to exhaust his remedies against a principal before resorting to the surety for payment of a debt for which both principal and surety were equally bound.

In *Geddis* v. *Hawk,* 1 Watts (Pa.), 280, it was decided that a creditor was not bound to resort to the principal for the collection of his debt, in the first instance, but that he might sue and recover from a surety.

"Where a contract of suretyship is joint and not several all the obligors must be joined as parties defendant. Where it is joint and several all or less than

all may be sued as plaintiff elects'': Brandt, Suretyship Guaranty (3 ed.), § 829.

It will be seen from an inspection of the undertaking hereinafter set forth that the person signing the writing stipulated that Ralson would faithfully perform all the conditions of the lease, thereby making the engagement of the guarantor the same as that of the principal. One of these obligations was to pay the rent reserved. The guaranty is therefore a joint and several express engagement to pay monthly in advance the sums of money specified. Thus in *Gile Grocery Co.* v. *Lachmund,* 75 Or. 122 (146 Pac. 519), a headnote reads:

"A guaranty is an absolute undertaking to pay the debt when due, and is not discharged by the failure of the creditor to exhaust his remedy against the principal debtor."

To the same effect see, also, *Weiler* v. *Henarie,* 15 Or. 28 (13 Pac. 614); *Delsman* v. *Friedlander,* 40 Or. 33 (66 Pac. 297). No error was committed in this particular.

The remaining question to be considered is whether any evidence was received at the trial tending to show that the defendant's agent was authorized to guarantee the payment of the rent in such a manner as to bind his principal, or whether it, by any act or omission of its officers, is liable for the payment of any part of the rent. It appears from a transcript of the testimony that the defendant on January 1, 1906, entered into a contract with Henry Meister whereby the latter was appointed its agent and given the exclusive right to sell in Oregon the manufactured product of that corporation. Meister in March, 1906, with the defendant's consent sold all his interest in such agency to C. B. Williams. Alex Sweek, an attorney of Portland,

Oregon, testified as plaintiff's witness that he was present when such bargain was concluded; that U. Remensperger and P. Windeler, respectively the president and secretary of the defendant, were also there on that occasion and advised that it was not necessary to write a new contract, but that a transfer of Meister's agreement with slight modifications was sufficient; that thereupon the witness made on such writing the notations "O. K." which is identified as indicating some of the clauses of the contract that were continued in force. In referring to the writing Mr. Sweek testified:

"It was delivered to Mr. Williams as his evidence of authority and the agreement between all of us was that the contract was to be handed to Mr. Williams, and he would have all of the authority disclosed by that contract, but no greater."

The original agreement was received in evidence and has been sent up with the transcript. An examination of the writing shows that clauses thereof, numbered 1st, 2d, 4th, 5th, and 6th, have written at the left of each on the margin of the paper the letters "O. K." The remaining paragraphs of the writing are not thus marked, but words and figures have been substituted in some instances instead of others as originally employed. The third clause has two crossed lines indicating that such paragraph had been set aside so far as it related to Williams' authority. A red line is drawn through each word of the ninth clause, which was originally as follows:

"It also authorizes and empowers its said agent to expend not to exceed the sum of $350, in fitting up a saloon for a person who will sell its beer for a term of years, upon the condition that if the person so agreeing shall fail or neglect so to sell said beer to the

exclusion of all beer for the time agreed, that is keg beer, then the sum expended to become immediately due and payable."

The paragraph formerly numbered 7th has written at the left the figures "10," while the clause previously marked 10th is now numbered "11." A part of that paragraph referring to the defendant and to Meister, conferring a right assigned to and intended to be exercised by Williams, reads:

"And it further authorizes him to sign agreements and leases with saloon-keepers and others buying said beer, for it and on its behalf, as its said agent and manager, hereby ratifying and confirming all that its said agent and manager for said territory may and shall lawfully do under this agreement."

The plaintiff herein being the owner of storerooms in a building in Portland, Oregon, executed a lease thereof to Crane & Dewey at a monthly rental of $175 to November 1, 1910, $250 a month for the second year, $300 a month for the third year, and $325 a month for the fourth year to expire November 1, 1913. This lease with the plaintiff's consent was assigned August 17, 1911, to John Ralson, who was to operate a saloon on the premises and sell exclusively the beer manufactured by the defendant. There was indorsed upon the assigned lease a memorandum which reads:

"Portland, Oregon.

"For valuable consideration we hereby guarantee the faithful performance by the above lessees of all their obligations under the within lease.

"(Signed) ENTERPRISE BREWING CO.
"U. REMENSPERGER, Pres.
"P. WINDELER, Sec."

The plaintiff executed to Ralson another lease of the premises for a term of two years commencing November 1, 1913, at the expiration of the original lease, at

a monthly rental of $200. There was indorsed on this second lease the following:

"Portland, Oregon, May 27, 1913.

"For valuable consideration we hereby guarantee the faithful performance by the within lessee of all his obligation under the within lease.

"(Signed) ENTERPRISE BREWING CO.
"By C. B. WILLIAMS, Agt."

Ralson on January 1, 1915, was indebted to the plaintiff to the extent of $400 for the use of the premises during the two preceding months, and upon his promise to pay that sum in installments, the rent was by agreement of the landlord reduced to $125 a month from January 1, 1915, to May 1st of that year, while $150 a month was stipulated to be paid until December 31, 1915, thereby extending the term of the second lease two months. In a letter written by the plaintiff January 11, 1915, to the defendant and C. B. Williams its agent, Portland, Oregon, the following language is found:

"In the matter of the lease to John Ralston, which you have guaranteed, we desire to confirm by this letter the agreement which was arrived at in the interview a few days since between Mr. Ralston, your Mr. Williams and the writer." (James D. Hart, the plaintiff's secretary, setting forth the terms hereinbefore stated:) "By this reduction the opportunity to the tenant to make the payment without calling upon you is enhanced and we have made the modification with the understanding that your guaranty will hold until said December 31st, 1915, for any portion of the above total of $2100 [the amount of the rent due and to accrue] that Mr. Ralston fails to pay."

A carbon copy of this note, accompanied by a letter written at the same time by Mr. Hart for the plaintiff was mailed to and received by the defendant at San

Francisco, California, January 13, 1915, but no response thereto was ever made.

Ralson paid the rent from January 1, 1915, to June 1st of that year. It is fair to infer, however, that he vacated the premises for on July 2, 1915, the plaintiff wrote the defendant saying in part, "that Mr. Ralston's place of business is closed and that he is now in arrears in rent for #120 North Sixth Street in the amount of $675.00," a demand for the payment of which was made. A carbon copy of this notification and a letter of similar import and demand were also mailed to the defendant at San Francisco, California. No response, however, was made thereto. Replying to a letter from plaintiff's counsel relating to the payment of the rent demanded, the defendant on July 14, 1915, wrote that the matter had been referred to their attorney at Portland, Oregon, and to Mr. Williams, its agent, saying *inter alia:*

"We are somewhat in the dark regarding the entire affair, and naturally wish to have some particulars, which will take up some time owing to the distance between us."

C. B. Williams, as plaintiff's witness, in answer to the inquiry:

"What were the circumstances under which you signed the name of the Enterprise Brewing Company to the Ralson lease, Mr. Williams?" testified over objection and exceptions as follows: "Mr. Ralson was complaining continually about his rental of the premises down there being too high, and after a conference or two with Mr. Hart, and between Mr. Ralson and myself and Mr. Hart, the question came up about an additional lease; and the former rental was $325, and he agreed to reduce the rental from that time on to $200, and give us a new lease for an additional two years, and Mr. Ralson was going to close up right then if he didn't get something of that sort, some conces-

sion on the rent there, so in order to get the thing off as soon as possible, I signed the indorsement [referring to the guaranty of May 27, 1913] believing that I had authority. * *

"Q. Did you notify the Enterprise Brewing Company of your action in indorsing this lease?

"A. I think so. * *

"Q. Did you ever receive from the Enterprise Brewing Company any objection of any sort to your action in that matter?

"A. No, sir. * *

"Q. What is the fact, Mr. Williams, as to whether or not it is necessary in selling beer for breweries in this district to guarantee leases, in order to hold the trade?"

Over objection and exception, the witness answered, "Yes, sir."

"Q. Did you do that in other instances than this one?

"A. Yes, sir.

"Q. Did the Brewery execute other guarantees?

"A. Yes, sir."

On cross-examination Mr. Williams testified that having purchased Meister's agency he continued the business in the name of the Enterprise Brewing Agency, a corporation, that became the selling agent for the defendant from which he received a salary and a commission, and that the defendant's beer was sold in Oregon only to the Enterprise Beer Agency. In answer to the question, "And you were practically the Enterprise Beer Agency?" the witness replied: "Yes, sir." Williams also testified that without the defendant's express authority he executed on its behalf a promissory note for $900, to evidence the purchase price of material that was used in erecting a building on a lot which he owned in Washington County, Oregon, and upon his conveyance of such premises to the defendant, it paid off the note. This witness further

stated upon oath that without consulting the defendant he signed attachment bonds on its behalf in actions to recover from saloon-keepers sums of money due from them for the purchase of beer.

The plaintiff's counsel introduced in evidence the depositions of U. Remensperger and P. Windeler, from which sworn statements it appears that neither the defendant corporation nor its board of directors ever adopted a resolution authorizing Williams to guarantee a performance of the conditions of Ralson's lease, nor did such officers or the corporation which they represented own any stock in the Enterprise Beer Agency, and that while the deponents personally signed such leases no person was authorized to do so for them.

The foregoing is deemed to be a fair summary of all the material evidence received at the trial. It will be remembered that the clause in the contract which was assigned to Williams empowered him to sign agreements and leases with saloon-keepers and others buying the defendant's beer. This language probably could not be construed as expressly authorizing the guaranty of payment of rent of a building which was used by a saloon-keeper who exclusively sold the defendant's beer. Mr. Sweek, however, interpreted that provision of the agreement as conferring such authority and so advised Williams who, as agent, signed the guaranty indorsed upon Ralson's lease and testified that he thought he notified the defendant of his action in the matter, and that no objection thereto was made by his principal. The uncertainty of Williams' testimony in this particular renders it problematical as to whether or not the defendant ever obtained such information. But however this may be, it did receive the letter written by Mr. Hart January 11, 1915, for the plaintiff in relation to the guaranty and

made no objection thereto. A sense of fair dealing demanded of the defendant a prompt denial of Williams' asserted right to indorse Ralson's lease if the authority had not been conferred, and the corporation desired to evade the legal consequences of its agent's act. The defendant should not be permitted by its silence to speculate upon the possibility of Ralson's success in operating a saloon and his resulting ability to pay the rent reserved, but if he failed in this particular then to deny Williams' authority to indorse the lease: *Currie* v. *Bowman,* 25 Or. 364, 377 (35 Pac. 848); *Finnegan* v. *Pacific Vinegar Co.,* 26 Or. 152, 155 (37 Pac. 457); *Schreyer* v. *Turner Flouring Mills Co.,* 29 Or. 1, 16 (43 Pac. 719); *Silsby* v. *Strong,* 38 Or. 36, 42 (62 Pac. 633); *Cranston* v. *West Coast Life Ins. Co.,* 72 Or. 116, 130 (142 Pac. 762).

4. As a corporation acts by its agents, the powers of its managing officers are coextensive with those of their principal, except in relation to matters over which the stockholders alone have control: 21 Am. & Eng. Ency. Law (2 ed.), 852. The defendant's president and secretary necessarily had sufficient power to adopt any reasonable means that might tend to advance the interests of the corporation, even without a resolution of the board of directors to that effect, and hence such managing officers could authorize Williams to indorse a lease, or ratify his act in that particular: *Calvert* v. *Idaho Stage Co.,* 25 Or. 412, 414 (36 Pac. 24); *Moll* v. *Roth Co.,* 77 Or. 593, 601 (152 Pac. 235).

5. A careful examination of all the evidence convinces us that no testimony was received tending to show Williams was ever empowered to guarantee the payment of rent of buildings even when occupied by saloon-keepers who had agreed to sell the defendant's beer exclusively. The fact that a red line was drawn

through each word of the 9th paragraph of the Meister contract which was assigned to Williams shows that his authority was intended to be restricted. It appears from the depositions of the president and secretary of the defendant that neither of them knew, until about eight months prior to giving their testimony, and probably when they received Mr. Hart's letter of January 11, 1915, that Williams had undertaken to guarantee the payment of Ralson's rent. These sworn statements are not seriously controverted by the testimony of Williams who "thinks" only that he notified these officers of his indorsement of the lease.

We conclude, therefore, that the defendant is not responsible for any part of the rent which was due January 1, 1915, for the preceding months of November and December, but that it is liable for the rent thereafter accruing and remaining unpaid, by reason of its failure to deny Williams' authority when notified by Mr. Hart.

The judgment will be modified by remitting the sum of $400 and the cause will be remanded with directions to enter a recovery against the defendant and in favor of the plaintiff for $1,050. MODIFIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Denied March 5, 1918.

ON PETITION FOR REHEARING. REHEARING DENIED.

(171 Pac. 223.)

Messrs. Dolph, Mallory, Simon & Gearin, for the petition.

Messrs. Wood, Montague & Hunt and *Mr. Donald M. Graham, contra.*

Department 2. MR. JUSTICE MOORE delivered the opinion of the court.

In a petition for rehearing it is insisted that the defendant was under no legal obligation to reply to the plaintiff's letter of January 11, 1915, containing the information that the term of the lease had been extended two months, from November 1st of that year and the monthly rent of $200 reduced to $125 to May 1, 1915, and to $150 for the remainder of the term, which modification was made pursuant to an agreement with C. B. Williams, the agent of the defendant, with the understanding that its guaranty would continue until December 31, 1915, and that when this court concluded the defendant's failure to answer such communication constituted an acceptance of the condition stated therein, the plaintiff was thus permitted to introduce evidence which had been manufactured for the occasion, whereby an error was committed.

6. When oral declarations are made by a party in the presence and hearing of his adversary who is under no restraint and conscious of the charge thus imputed, asserting against him an obligation which might be enforceable, or his commission of an offense, or limiting his title to property, or affecting him injuriously, it is reasonable to suppose he would promptly deny such positive declarations, if he desired to escape unfavorable inferences which might be deduced from his silence, and hence he is usually required hastily to refute such charges: 16 Cyc. 958. This rule, however, does not generally apply to written communications containing statements of facts, a failure to deny which is not construed as a tacit admission of the truth of the writing, and no unfavorable inference arises from such silence, except in cases when the party receiving the letter has invited it, or where there is reason to

believe he has acted upon the information thus received, or when there has been sent with the letter bills showing a shipment of goods, which invoices have been retained without objection, or where money has been sent upon a condition stated in the letter, and the sum has not been returned: 16 Cyc. 960. As sustaining the legal principle thus stated, see *State* v. *MacFarland*, 83 N. J. L. 474 (83 Atl. 993, Ann. Cas. 1914B, 782); *Seevers* v. *Cleveland Coal Co.*, 158 Iowa, 574 (138 N. W. 793, Ann. Cas. 1915D, 188).

7. These rules, however, have no application to the law governing the relation of agency. If a principal, when fully notified thereof, neglects promptly to disavow an act or contract of his agent in excess of his authority, such silence will usually be interpreted as an implied ratification, and particularly so, if the failure speedily to repudiate such conduct or agreement might impose upon the other party loss or injury: 31 Cyc. 1276; 2 C. J. 505; *Curtze* v. *Iron Dyke Min. Co.*, 46 Or. 601, 606 (81 Pac. 815).

"The rule," says Mr. Justice BEAN in *Reid* v. *Alaska Packing Co.*, 47 Or. 215, 220 (83 Pac. 139), "is elementary that when an agent, in contracting for his principal, exceeds his authority, the principal, upon being fully informed of the facts, must, within a reasonable time, disavow or disaffirm the act of his agent, especially in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified and affirmed such unauthorized act, and such ratification will be equivalent to a precedent authority."

To the same effect see, also, 2 C. J. 504, § 124, and exhaustive notes on this subject.

8. Ratification by a principal of an unauthorized act of his agent has occasionally been grounded upon the doctrine of an equitable estoppel. A clear distinction,

however, exists between an estoppel *in pais* and ratification.

"The substance of ratification is confirmation of the unauthorized act or contract after it has been done or made, whereas the substance of estoppel is the principal's inducement to another to act to his prejudice. Acts and conduct amounting to an estoppel *in pais* may in some instances amount to a ratification; but on the other hand ratification may be complete without any elements of estoppel": 2 C. J. 469; 31 Cyc. 1247.

In the case at bar, it is possible the extension of the term of the lease and the reduction of the monthly rent might be regarded as creating an equitable estoppel, but however that may be, we rest our decision upon an implied ratification by the defendant of its agent's unauthorized assumption of authority, by failing, when fully notified thereof, promptly to deny his power to consummate the agreement.

We therefore adhere to the former opinion and the petition for a rehearing is denied.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCCAMANT and MR. JUSTICE BEAN concur.

Argued January 10, reversed and remanded February 5, petition to modify denied March 5, 1918.

LEARNED *v.* HOLBROOK.*

(170 Pac. 530; 171 Pac. 222.)

Evidence—Parol Evidence Affecting Writing.

1. Section 713, L. O. L., providing that, where the terms of an agreement have been reduced to writing, it is to be considered as

*On the general rule that parol evidence is not admissible to vary, add to, or alter a written contract, see note in 17 L. R. A. 270.

On reasonableness of amount stipulated for as liquidated damages in a contract, see note in 34 L. R. A. (N. S.) 27. REPORTER.

containing all of them, and there can be no evidence thereof other than the contents of the writing, prevents parol evidence, in action on a bond, conditioned that the obligors erect a sawmill of certain capacity on their property, that it was the understanding of the parties that a sawmill could not be erected there unless the streets were vacated.

Contracts—Performance—"Impossible."

2. Contract of parties to build a mill on their property is not "impossible" of performance, so as to excuse nonperformance, because the mill could not be profitably operated without vacation of streets; impossible not meaning impracticable.

Bonds—Conditions—Breach.

3. Obligation on a bond, conditioned that the obligors build a mill on their property, is matured by their selling their property without constructing the mill.

Contracts—Possibility of Performance—Vacation of Street—Evidence.

4. As showing willingness of a city council to vacate streets for industrial plants, an ordinance for such purpose, though not complying with statutory requirements, is admissible.

[As to right of action for damages for breach of unenforceable contract, see note in **Ann. Cas.** 1915D, 540.]

Damages—Liquidated Damages or Penalty.

5. A bond running to owners of property in the neighborhood, conditioned to pay a certain sum as liquidated damages for failure of obligors to build a mill on their property, the damages being difficult or impossible of proof and measurement, is one for liquidated damages.

Damages—Liquidated Damages—Reasonableness.

6. The reasonableness of damages liquidated by agreement is to be determined by the conditions in the minds of the parties when their agreement was made.

Damages—Liquidated Damages—Burden of Proof.

7. Parties sued for liquidated damages have the burden of showing that no damages could have flowed from their default in the performance of their agreement.

Appeal and Error—Directing Judgment.

8. The case being one in which it can be determined from the record what judgment should have been entered, the appellate court will, under Article VII, Section 3, of the Constitution, direct the entry thereof.

ON PETITION FOR REHEARING.

Damages—Liquidated Damages—Effect—Agreement.

9. Where the parties by contract stated a reasonable sum as liquidated damages, neither could urge that the damages were greater or less than the amount agreed upon.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE MCCAMANT.

Prior to March 12, 1903, defendants were the owners of an undivided one-fourth interest in certain property situate in St. Johns. Oak Park Land Company and the Estate of B. O. Severance were the owners of the remaining three-fourths interest. An agreement partitioning the property was entered into and as a part of this agreement the defendants executed and delivered the following paper:

"Know all men by these presents, that we, Merrit L. Holbrook and F. S. Doernbecher, are held and firmly bound unto Oak Park Land Company, a corporation, Otis E. Learned and the Estate of B. O. Severance, deceased, in the sum of two thousand dollars in U. S. gold coin, to be paid to the said Oak Park Land Company, Otis E. Learned and the Estate of B. O. Severance, deceased, their heirs, successors, executors, administrators, or assigns, as liquidated damages for a failure to comply with and fulfill the conditions of this bond as hereinafter provided; for the payment of which well and truly to be made we do bind ourselves, our heirs, executors and administrators, firmly by these presents.

"Sealed with our seals and dated the 12th day of March, A. D. 1903.

"The conditions of this obligation are as follows: All of the parties hereto, are jointly the owners of Fractional Blocks numbered 9, 11, 12 and 13 and River Lots numbered one (1) to fourteen (14), both inclusive, in James John's Addition to St. Johns, and River Lot numbered 'A,' in James John's 2nd Addition to St. John's, all in the County of Multnomah and State of Oregon. The said ownership being held as follows: M. L. Holbrook and F. S. Doernbecher an undivided one-quarter, and Oak Park Land Company, Otis E. Learned and the Estate of B. O. Severance, deceased, the remaining undivided three-quarters, and besides this property the said M. L. Holbrook and F. S. Doernbecher are the owners of Fractional Block numbered

seven (7), known as the Knight Block in James John's Addition to St. Johns, in said County and State.

"In an endeavor to adjust and reconcile the several interests acceptably to all parties hereto, an arrangement for a division of the property has been made and mutually agreed to, whereby the said M. L. Holbrook and F. S. Doernbecher are to become the exclusive owners of Fractional Blocks 11, 12 and 13, and River Lots 7 to 14, inclusive, and the said Oak Park Land Company, and Otis E. Learned are to become the exclusive owners of the remainder of all properties hereinbefore mentioned.

"The foregoing conditions and arrangements are to be complied with at and before the delivery of this bond; but a part, which is indeed a vital part of the consideration moving the said Oak Park Land Company, Otis E. Learned and E. Quackenbush, administrator of the Estate of B. O. Severance, deceased, is an agreement on the part of the said M. L. Holbrook and F. S. Doernbecher to erect a sawmill upon their portion of the above mentioned property of 50,000 feet per day capacity, and to begin the actual construction thereof within sixty (60) days from this date, and to continue the said construction until the said mill is fully completed and ready for active operation, and the time of completion and active operation is to be not later than the first day of September, A. D. 1903.

"And in the event of the said sawmill being so completed on or before the first day of September, A. D. 1903, this obligation shall be void, otherwise to remain in full force and virtue."

It is admitted that the property was partitioned in the manner indicated in the above instrument and that defendants sold the property allotted to them without erecting a mill thereon. Oak Park Land Company assigned its cause of action to the plaintiff Quackenbush, who was also duly appointed trustee of the Estate of B. O. Severance. This action is brought to recover the sum of $2,000 as liquidated damages for the

failure and refusal of defendants to construct the mill in question.

The case was tried without a jury. The findings and judgment were for defendants and plaintiffs appeal.

REVERSED WITH DIRECTIONS.

For appellants there was a brief over the names of *Mr. Miller Murdoch* and *Mr. V. A. Crum,* with an oral argument by *Mr. Murdoch.*

For respondents there was a brief over the name of *Messrs. Wood, Montague & Hunt,* with an oral argument by *Mr. Richard W. Montague.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. The defendant Holbrook was permitted to testify over plaintiff's objection and exception as follows:

"Q. What was the understanding among the parties, if there was any, as to the necessity of vacating streets intervening between the different parcels of that property?

"A. It was clearly understood by everybody interested in the transaction and who knew the property and knew what it was that a sawmill could not be erected there unless the streets were vacated. Nothing could be more clearly understood than that. That was discussed frequently and Mr. Powers assured me there would be no trouble about getting the streets vacated."

This testimony was clearly inadmissible. The parties had reduced their agreement to writing and their intent and understanding are to be gathered from the writing: Section 713, L. O. L.; *Maxson* v. *Ashland Iron Works,* 85 Or. 345, 353 (166 Pac. 37, 167 Pac. 271); *Muir* v. *Morris,* 80 Or. 378, 403 (154 Pac. 117, 157 Pac. 785). In a case tried without the intervention of a jury the admission of incompetent testimony will often

be disregarded, the court presuming that the improper evidence has been disregarded by a trier learned in the law: *Zelig* v. *Blue Point Oyster Co.,* 61 Or. 535, 544 (113 Pac. 852, 122 Pac. 756); *Williams* v. *Burdick,* 63 Or. 41, 49 (125 Pac. 844, 126 Pac. 603); *Latourette* v. *Miller,* 67 Or. 141, 147 (135 Pac. 327). We cannot indulge that presumption in the case at bar. The conclusions of the lower court are based on the assumption that the vacation of certain streets in St. Johns was contemplated by the parties and that their agreement was conditioned thereon.

2. The defense was based on the alleged impossibility of performing the agreement sued on. The third finding, duly excepted to, was as follows:

"That owing to the size and shape of the property in the city of St. Johns upon which the agreement hereinbefore set forth contemplated the erection of a mill, it was impossible to erect a sawmill of the capacity mentioned in the contract set forth in the complaint or to operate the same unless the streets intervening between the separated portions of said property should be vacated so that said property could be used, and that such facts were known and within the contemplation of all the parties to such agreement at the time of making the same and thereafter."

This finding is wholly without competent evidence to support it. The defendants introduced expert testimony to show that the lots set apart to them on the partition were too small in area to admit of the profitable operation of a sawmill thereon. This testimony does not lead to the conclusion that their contract was impossible of performance. In *Reid* v. *Alaska Packing Co.,* 43 Or. 429, 436 (73 Pac. 337) Mr. Justice BEAN says:

"The rule to be deduced from the authorities is that, if one enters into a valid contract, for a sufficient con-

sideration, to do a lawful thing, possible in itself—that is, in the nature of things—to be done, he must either carry out the contract according to its terms or answer in damages for a failure to do so. The mere impossibility of performance in fact will not be enough, but the contract must be obviously impossible upon its face before such a defense can be made."

The contract in that case was to pack, in Alaska, salmon "exactly like Puget Sound fancy Sockeye." The inference of impossibility was sought to be drawn from evidence that no such salmon are caught in Alaska. It was held that they might be caught in Puget Sound and transported to Alaska for packing, or that such salmon might be found in Alaska at some time in the future. The decision is to the effect that "impossible" does not mean "impracticable." A party who contracts to do that which is not inherently impossible on the face of the agreement is not to be released from his obligation by proof that it would be commercially unprofitable to carry it out. The doctrine of the above case is affirmed in *Anderson* v. *Adams,* 43 Or. 621, 630 (74 Pac. 215); *Fleishman* v. *Meyer,* 46 Or. 267, 270, 271 (80 Pac. 209); *Zanello* v. *Smith & Watson Iron Works,* 62 Or. 213, 217 (124 Pac. 660). It appears from the defendants' testimony that it is not impossible to erect a sawmill on the property in question; all that the testimony tends to prove is that such a mill could not be profitably operated without control of a larger piece of land and without the vacation of certain streets which intersect the property. The court erred in deducing the third finding from this testimony.

3. It is admitted that under date of April 8, 1903, the plaintiff Quackenbush signed and delivered the following instrument:

"Referring to a certain bond executed by F. S. Doernbecher and M. L. Holbrook on the 12th day of

March, 1903, in behalf of the Oak Park Land Company and Otis E. Learned, wherein time is made the essence of the matter of the beginning and completion of a sawmill on certain land of St. Johns mentioned in the said bond.

"This is to certify the modification by mutual consent of that portion of said bond relating to the time when said mill is to be begun and completed;

"That is to say, if the proceedings to be instituted by the said Holbrook and Doernbecher with the authorities for the vacation of said streets are prolonged by the opposition of the interested property owners beyond the usual time required in such matters such delay is not to be charged against the said Holbrook and Doernbecher under said bond."

Plaintiffs contend that this instrument is not binding upon them because it was executed without consideration and was signed only by the plaintiff Quackenbush at a time when he individually had no interest in the cause of action.

It will not be necessary to pass upon these contentions. Assuming that the foregoing instrument binds plaintiffs, it does not purport to do more than extend the time allowed defendants within which to fulfill their covenant. It is alleged in the complaint that defendants have refused to build the mill stipulated for and this allegation is proved by the admitted fact that they sold the property without first constructing a mill thereon. This sale operated to mature the obligation of defendants.

4. It appears by the testimony that defendants made application for the vacation of certain streets which intersected their property and that the council declined to order a vacation, although it was willing to lease the streets to defendants for a term of years at a nominal rental. From this testimony the court found "that the authorities of the city of St. Johns positively and finally

refused to vacate said streets or any part thereof sufficient to enable the sawmill to be erected." The finding that the refusal was final is without support in the evidence. The council of St. Johns was subject to change at each city election and the refusal to vacate on one application by defendants could not in the nature of things be final. Plaintiffs introduced in evidence a certified copy of an enrolled ordinance of date February 15, 1904, vacating certain of these streets. Defendants contend that the ordinance was inadmissible for the reason that the record fails to show compliance with Sections 3276 and 3281, L. O. L., prescribing the procedure for vacating streets. We think the ordinance was admissible for the purpose of showing the attitude of the council on the subject of vacating streets. It tended to show that if defendants had persevered with their application the streets would have been vacated at their instance.

5. It remains to construe the agreement on which the action is brought. Defendants contend that the sum of $2,000 mentioned therein is a penalty and that no recovery can be had against them for the reason that plaintiffs have suffered no damage. The obligation of the defendants ran to the owners of properties in the immediate vicinity of the lots and blocks set apart to the defendants in severalty. It was the belief of the obligees that the construction of a sawmill by the defendants on their property would enhance the value and promote the sale of these other properties belonging to the obligees. The plaintiff Quackenbush testifies that the defendants were liberally dealt with on the partition. This testimony is not negatived by the findings and is corroborated by several circumstances which appear in the record. It appears from the agreement that the stipulation of the defendants to erect the

mill was "a vital part of the consideration moving" obligees to convey to them in severalty the property on which the mill was to be constructed. Mr. Quackenbush testifies without contradiction that the damages of plaintiffs arising from the default of the defendants in the performance of their stipulation would be difficult or impossible to prove and admeasure. The parties dealt with each other at arm's-length. On both sides they were business men of experience and no fraud or imposition is suggested. It is well settled in this jurisdiction that in such case the agreement of the parties liquidating their damages will be enforced unless the sum agreed upon "is so grossly unconscionable and oppressive as to shock the conscience of the court": *Hull* v. *Angus,* 60 Or. 95, 107 (118 Pac. 284). We cannot improve upon the statement of the law made by Mr. Justice BURNETT in the case last cited, or that of Mr. Justice BEAN in *Salem* v. *Anson,* 40 Or. 339, 344 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169). These decisions have been followed and applied by Mr. Justice MOORE in *Krausse* v. *Greenfield,* 61 Or. 502, 512 (123 Pac. 392, Ann. Cas. 1914B, 115), and by Mr. Justice BEAN in *Strode* v. *Smith,* 66 Or. 163 (131 Pac. 1032). This case is distinguished from *Wilhelm* v. *Eaves,* 21 Or. 194, 200 (27 Pac. 1053, 14 L. R. A. 297), and *Alvord* v. *Banfield,* 85 Or. 49, 58, 59 (166 Pac. 549). In each of these latter cases the stipulated damages were agreed to be paid on default in any one of a number of covenants. The actual damages arising from these defaults varied greatly in amount. From this circumstance an intention to name a penalty was properly inferred. In the case at bar the agreed damages are applied by the parties to the breach of a single covenant, the agree-

ment to construct a sawmill. In 19 Am. & Eng. Enc. Law (2 ed.), 405, it is said:

"The fact that a contract is for the performance of a single act or condition is regarded by the courts as favoring the construction that a stipulated sum to be paid on nonperformance is to be regarded as liquidated damages rather than as a penalty."

Pearson v. *Williams Admrs.*, 26 Wend. (N. Y.) 630, is parallel with the case at bar. The defendant in that case purchased lots from plaintiff for $21,000. It was a part of the contract that defendant should erect brick houses on the lots purchased and in default of such erection defendant agreed to pay damages in the sum of $4,000. Plaintiff was the owner of other property in the neighborhood. Chancellor WALWORTH held that the agreement was one for the payment of liquidated damages and that defendant was liable in accordance with the letter of his agreement.

6. The question remains as to whether the damages fixed by these parties are so excessive and unreasonable as to take the case out of the operation of the rules announced in the above authorities. The lower court made no finding on the subject of damages. The obligees retained as their property Fractional Block 9 and River lots 1 to 6, inclusive. The Severance Estate was the owner of sixteen acres or more on the hill in the neighborhood. This latter property was subsequently platted and sold in part at from $300 to $800 a lot. The property was platted in such manner that an acre of land was cut up into six lots and a fraction. The correspondence indicates that the defendants considered that the river front property in which they held a one-fourth interest was worth about $24,000 at the time the property was partitioned. The benefit to accrue to the obligees from the erection of a mill on the property as-

signed to the defendants in severalty was speculative and uncertain, but it might have largely exceeded $2,000. The construction of the mill might have made the difference between an immediate sale of the properties of the obligees at a fair price and the burden of carrying the property through a series of years when property should be unsalable. The plaintiff Quackenbush testified that a mill which should be "compelled to suspend because of its general worthlessness would not have been of advantage to the property." But it is fair to assume that the erection of such a mill was not within the contemplation of the parties. The defendants would not have agreed to erect a mill had they not believed that it could be operated profitably. The reasonableness of damages liquidated by agreement of the parties is to be determined by the conditions in the minds of the parties when their agreement is made: *Hull* v. *Angus,* 60 Or. 95, 107, 108 (118 Pac. 284). The obligee can recover no more than the stipulated sum even though his actual damages are in excess thereof and the obligor is liable for this sum if the damages prove less or nonexistent: *Salem* v. *Anson,* 40 Or. 339, 344 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169).

7. The evidence fails to satisfy us that the obligees sustained no damage in the instant case. The contention of the defendants on this subject is based wholly on their expert testimony that a mill could not be operated profitably on the lots set apart to defendants without the vacation of the intersecting streets and on their further claim that the council was unwilling to vacate these streets. There were received in evidence certified copies of two ordinances vacating streets in St. Johns for the accommodation of industrial plants. The record fails to show that the statutory requirements for the vacation of streets were complied with, but the ordinances sufficiently show a willingness on the part

of the council to vacate streets with a view to securing local industries. We may concede that these vacations were irregular and abortive. The inference nevertheless remains that what the council attempted to do ineffectively, it was ready to do regularly. The burden was on defendants to show that no damages could have flowed from their default in the performance of the agreement sued on. In our opinion, they have not sustained this burden. We do not overlook the principle that the findings of the lower court are binding upon us in so far as they are supported by the evidence. This principle has a very limited application in the instant case. Some of the findings are without support in the evidence and the determinative facts are admitted either by the pleadings or by the testimony of the defendant Holbrook.

8. This is a case in which we can determine from the record what judgment should have been entered in the court below. It is our duty under the provisions of Article VII, Section 3, of the Constitution to direct the entry of such judgment. The defendants agreed to construct a mill or to pay $2,000: *Hull* v. *Angus,* 60 Or. 95, 106 (118 Pac. 284). Having refused to do the former, it is their legal duty to do the latter. Their sale of the property was their final refusal to build the mill. The judgment is reversed and the cause remanded to the Circuit Court with directions to enter judgment for plaintiffs for $2,000, without interest: *Sargent* v. *American Bank,* 80 Or. 16, 40–46 (154 Pac. 759, 156 Pac. 431); *Holtz* v. *Olds,* 84 Or. 567, 580 (164 Pac. 583, 1184).

REVERSED WITH DIRECTIONS.
PETITION TO MODIFY DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Denied March 5, 1918.

ON PETITION TO MODIFY FORMER OPINION. DENIED.

(171 Pac. 222.)

Messrs. Wood, Montague, Hunt & Cookingham, for the petition.

Mr. Miller Murdoch and *Mr. V. A. Crum, contra.*

Department 2. MR. JUSTICE MCCAMANT delivered the opinion of the court.

Defendants petition us to modify our conclusions in so far as they direct the lower court to enter judgment in favor of plaintiffs in the sum nominated in the bond. They ask that the cause be remanded to the lower court with leave to defendants to offer evidence to show that plaintiffs have sustained no damage by the default complained of.

9. For reasons with which we are still satisfied, we have ruled that it was competent for these parties to liquidate the damages arising from a default by the defendants in the agreement alleged in the complaint. We have decided that the sum at which these damages were liquidated was not unreasonable in view of the conditions obtaining when the bond was executed.

It follows that the parties are bound by their agreement. Plaintiffs could not be heard to say that their damages are greater than $2,000, and defendants are not entitled to urge that there are no damages: *Salem* v. *Anson,* 40 Or. 339, 345 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169); *Webster* v. *Bosanquet,* [1912] App. Cas. 394 (Ann. Cas. 1912C, 1019).

The former opinion is adhered to.

PETITION TO MODIFY DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Argued February 19, affirmed March 5, 1918.

MELHASE *v.* MELHASE, EXECUTOR.

(171 Pac. 216.)

Wills—Setting Aside Probate—Issues and Proof.

1. In a proceeding to set aside the probate of a will, a petition, alleging that the instrument admitted to probate was not the last will and testament of the decedent, was sufficient to permit the admission of evidence of the existence of a later will revoking the one admitted to probate.

Wills—Lost Wills—Parol Evidence.

2. In a proceeding to set aside the probate of a will, evidence of the execution and contents of a later lost will, so far as they could be reproduced from the memory of witnesses cognizant of the circumstances, was admissible to show that it superseded and revoked the will admitted to probate; there being no attempt to probate the lost will.

Wills—Revocation by Subsequent Lost Will—Sufficiency of Evidence.

3. In a proceeding to set aside the probate of a will, evidence *held* sufficient to show that the testator made a later will revoking the one probated, which was lost or suppressed.

Wills—Revocation by Subsequent Lost Will—Sufficiency of Evidence.

4. In a proceeding to set aside the probate of a will, it was not necessary for the petitioner to prove the whole substance of a later lost will, and it was sufficient that she clearly established the fact that a later will was made, and that it revoked prior wills.

[As to the necessity that the contents of a subsequent will be proved in order that it may revoke prior will, see note in **Ann. Cas. 1914D, 130.**]

From Klamath: DELMON V. KUYKENDALL, Judge.

A proceeding by Henrietta F. Melhase against Gustav Melhase, executor of the estate of Frederick Melhase, deceased, Bertha Lehenbower, Clars Frank, Emma Ketsdever, Alford Melhase, Richard Melhase and Gustav Melhase, to set aside the probate of and to cancel a will made by Frederick Melhase. There was a decree for the plaintiff and defendants appeal. Affirmed.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is a proceeding to set aside the probate of a will. The petition alleges in substance that Frederick Melhase died December 8, 1915, being at the time a resident of Klamath County, Oregon; that on December 16, 1915, Gustav Melhase presented to the County Court an instrument purporting to be the last will and testament of said decedent and filed a petition for its admission to probate, and the appointment of himself as executor, which petition was granted. Then succeed the following allegations:

"That the said Frederick Melhase never signed the said purported and alleged instrument in the presence of the witnesses whose signatures appear upon same; that the said witnesses never signed the said instrument at the request of the said Frederick Melhase, and that the said Frederick Melhase never, at any time, published the said instrument and declared the same to be his last will and testament, and therefore, plaintiff alleges that the said purported and alleged instrument never was the will and testament of the said Frederick Melhase.

"That the defendants, and all of them, well knew at the time of the offering of said instrument as the last will and testament of the said Frederick Melhase that the said instrument was not the last will and testament of Frederick Melhase, deceased.

"That the said instrument offered and admitted to probate is not the last will and testament of the said Frederick Melhase, deceased.

"That the said defendants, acting together, have conspired to suppress and have suppressed the true will and testament of the said Frederick Melhase deceased, to the damage of this plaintiff."

The defendants answered, admitting generally the probating of the alleged will of 1908 and denying the paragraphs above quoted. A trial was had before the

County Court sitting in probate, which found in favor of the respondent and dismissed the petition. Thereupon petitioner appealed to the Circuit Court, which found for the petitioner and reversed the decree of the County Court and revoked and annulled the letters testamentary issued to defendant Gustave Melhase. From this decree defendants appeal. AFFIRMED.

For appellants there was a brief over the names of *Mr. C. F. Stone* and *Messrs. Snow, Bronaugh & Thompson,* with oral arguments by *Mr. Stone* and *Mr. W. Lair Thompson.*

For respondent there was a brief over the names of *Mr. Charles J. Ferguson, Mr. Thomas Drake* and *Messrs. Emmons & Webster,* with oral arguments by *Mr. Lionel R. Webster* and *Mr. Ferguson.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

A preliminary question is raised by respondent as to the validity of the execution of the will presented to the County Court by defendant Gustav Melhase, but it is sufficient to say that we are of the opinion that it was properly attested and entitled to probate unless it had been revoked by a subsequent will. We take it therefore as established that on the twenty-eighth day of July, 1908, deceased duly executed a valid will by which he devised certain property and bestowed legacies upon plaintiff and the defendants, and unless there was a later will revoking that of July 28, 1908, petitioner's contest must fail. Having established the will of 1908 as a will valid in form and substance the proponent was not obliged to negative by testimony the existence of a possible subsequent will, and it devolved upon the petitioner to show by testimony of the same character as that required of the proponent in the first

instance, that deceased executed a later will which, by its actual language or by necessary implication, revoked the will presented by proponent.

1, 2. It is claimed by appellants that the petition does not state facts sufficient to permit the admission of evidence of the existence of a later will, but we think the allegation that the instrument propounded is "not the last will and testament" of deceased, is broad enough to justify the admission of any testimony which might tend to show a state of facts inconsistent with the continued validity of the instrument. The contention of the petitioner is that in 1911 the deceased made a valid will revoking the will of 1908, which will has been lost, suppressed and destroyed, and all of the contents of which cannot be reproduced by oral testimony. There is no attempt here to probate this alleged lost will. Evidence of its execution is only admitted for the purpose of showing that it superseded and revoked the will of 1908, for which purpose we think evidence of its execution and contents so far as they could be reproduced from the memory of witnesses cognizant of the circumstances, was admissible.

3. We will now consider the testimony regarding the execution of the alleged will of 1911. It was not produced. If it actually existed it was lost or suppressed. The evidence that it was suppressed by the proponent is not conclusive. Shortly after the death of his brother, he procured from the petitioner the keys to the safety deposit box of deceased, which he claims to have been a partnership box of himself and deceased, but to which he had no key and no access during his brother's absence, and in company with his near relatives made a search for a will and produced the will of 1908. It is a suspicious circumstance that this search was made without notice to the wife of de-

ceased, who was certainly the person most interested in the result, and only in the presence of the immediate relatives of proponent. It also appears that proponent is claiming an oral partnership with deceased, and that his interests in that respect would be antagonistic to petitioner. His conduct in instituting this secret examination is at least open to suspicion, which his testimony does not dispel. The opportunity to examine and suppress a later will existed, there was a possible motive, and the secret method adopted does not commend itself. The evidence of Mr. Stone, who is one of the attorneys for proponent is significant. He testified in substance, that when the 1908 will was brought to his office he told proponent to go back and take another look, and further testified as follows:

"Q. I think you have stated that you told the witness, Gustav Melhase, when he brought that will and this envelope together, as you say this paper here, this purported will and another envelope,—you told him to go back and take another look?

"A. Yes, I did.

"Q. You had a reason for telling him that?

"A. Yes.

"Q. What was the reason? Can you tell us now, Mr. Stone?

"A. Well, I had an impression we had made Fred Melhase's will.

"Q. Well, now,—

"A. That recalled the impression to my mind.

"Q. You didn't make this? [Referring to Exhibit 'A.']

"A. No, I didn't make that; that is not my work on the typewriter, or the work of anybody that ever worked for me on the typewriter. No, I never made that will. * *

"Q. In your opinion, when did you make a will for Fred Melhase, about when?

"A. Well, according to the impression that is in my mind I think I made a will for Fred Melhase sometime in the early part of 1911.

"Q. That would be some three years later?

"A. Yes, in 1911.

"Q. The will was executed, I suppose? If you made a will for him, it was executed?

"A. Well, I don't remember its execution as an independent fact. I don't believe I remember the execution of any instrument that was ever made in my office unless it was made a few days ago, as an independent fact, that is, each person signing. Now, to illustrate, I think I made a will for Mrs. Melhase.

"Q. About when?

"A. About the early part of 1911.

"Q. Right at the same time you made the will for Fred Melhase?

"A. About the same time, but I don't remember. I don't remember seeing her sign that will. There are some people probably who remember those things. I can't unless I try to store my memory with them and that would be useless; if one did that, they would be so confused, they could not testify to anything. * *

"Q. Now in the will that you made, have you any recollection what it purported to give, devise, and who the legatees and devisees were? Do you remember any of them?

"A. Well, now there is something in my mind in a rather indistinct way; it is no stronger than what I said with reference to my memory of having made his will.

"Q. You have noticed the contents of this have you not, this Exhibit 'A' here?

"A. Yes, I am familiar with the contents of that.

"Q. You have noticed a devise in here to Mrs. Henrietta F. Melhase, the widow?

"A. Yes.

"Q. Do you remember whether she was mentioned in the will that you made for Fred Melhase?

"A. My recollection is that she was.

"Q. Do you remember of a person mentioned in the will that you made, getting a legacy, a little child, a little girl of Fred Shallock, of this city?

"A. Yes, I,—that, in fact, is the thing that fixes the making of the will on my mind, or that fixes in my memory there was a legacy, or I am of the opinion, to the best of my—

"Q. Has it come back to you?

"A. There was a legacy left to the little girl of Fred Shallock.

"Q. Little Constance Shallock?

"A. I don't know what her name is; her mother is sitting here, Mrs. Fred Shallock.

"Q. Mrs. Fred Shallock's little daughter?

"A. Yes.

"Q. I will ask you to state whether or not you were legal adviser for the deceased, Frederick Melhase, for some time prior to his death?

"A. I was for a number of years.

"Q. I will ask you to state with reference to that little girl whether or not you have heard the deceased, when addressing himself with reference to her use any pet name? Did you ever hear him call her 'that little devil' for instance, meaning it in an endearing way?

"A. Yes, I have heard Fred Melhase talk about the little girl frequently; I have heard him talk in my office; I have heard him speak of her; he thought a great deal of the little girl. I have, yes. I have often seen him on the street with her.

"Q. She called him grand dad?

"A. I think he thought quite a lot of the little girl and she seemed to think a great deal of him.

"Q. Now, do you have any recollection of about the amount of legacy to that little girl?

"A. Somehow or another I have it in my mind that it was $1,500, that is the way I recollect it.

"Q. I will ask you to state whether or not you are acquainted with Mrs. Fredericka Melhase, the mother of Frederick Melhase, deceased. Were you acquainted with her in her lifetime?

"A. No."

The witness further testified:

"A. Let me tell you the frame of my mind. If you were to present me with a will witnessed by myself and J. J. Barrett, and signed by Frederick Melhase, I would not hesitate a minute, if it was made about that time, to state that I made that will, and to say that was my signature, if it was my signature, but as I told you, I don't remember seeing Fred Melhase sign that will and I don't remember seeing J. J. Barrett sign as a witness. I don't remember signing myself. I told you what I do remember according to the way I recollect it. I remember drawing a will for Fred Melhase, remember of Barrett sitting at the typewriter in the other office and writing on that will. Now, that is just about all I recollect, so far as the making of the will is concerned. I have got that fixed in my memory as something, some way or another, that got into my memory, and it is there, and I recalled it at the time this will was brought into my office, when we took it out of these envelopes. I recollected that and I thought that probably there might be another will. I was under that impression. Of course, after a man dies and you made his will, it comes into your mind some way or other.

"Q. Certainly.

"A. I was under the impression when the will was brought in, it would be the one I made.

"Q. Naturally.

"A. That is about the way the thing was fixed in my mind. As I told you, I don't understand the memory of a man who can go on the stand and say he can remember signing, or anything like that, so many years afterwards. I cannot do it."

Mr. Stone was not volunteering any testimony against his client, but nobody can read the record of it as a whole without being satisfied that his memory convinces him that in 1911 he made a will for the deceased, and that the details of the transaction only are uncertain, as they well might be after a lapse of so many years. Mr. Stone's partner at the time the

alleged will was executed, was J. J. Barrett, a young man just entering upon the practice of law, who testified that in the first half of January, 1911, the deceased came to the law office of Stone and Barrett and had a talk with Mr. Stone; that as a result of that interview, Mr. Stone drew up in pencil the draft of a will for deceased and handed it to him to copy upon the typewriter, which he did; that it was the first will he ever had anything to do with drafting; that he was not very familiar with the form of wills at that time and kept a copy which he used thereafter as a form in drafting other wills; that the will was in the ordinary form used here in Oregon; that he remembered the names of the persons mentioned as legatees and devisees; that Gus Melhase and Fred Shallock were named as executors; that he could not recollect the amounts of the various bequests and legacies, but was positive that Fred Shallock's daughter was to receive $1,500. He remembered that the wife of deceased was mentioned in the will and also his mother, three brothers and two sisters; that witness and Mr. C. F. Stone subscribed their names as witnesses. In answer to leading questions Mr. Barrett testified that the will contained the usual clause revoking all prior wills and codicils.

Unless this witness has committed downright perjury, the deceased in January, 1911, executed a will revoking all other wills. It is easy to forget an actual occurrence, but it is not within the bounds of ordinary experince that one honestly thinks he remembers the details of an occurrence which happened only in his imagination. This testimony is either fabricated out of whole cloth or it is true. We believe it to be true, because it is corroborated by the imperfect recollection of Mr. Stone and the additional circumstances

hereafter referred to. Mr. Stone testifies that the one thing that recalls indistinctly to his memory the fact that he made a will for deceased, was the fact of a legacy given by it to little Constance Shallock, the daughter of Fred Shallock. It is in evidence that he was greatly attached to the child and referred in a rough yet endearing way to her as his "little devil" and his little partner. The child is not mentioned in the will of 1908.

F. C. Stitser, a friend of deceased, visited him in San Francisco during his last illness, and in the course of a conversation with him not necessary to detail here, said—referring to Constance Shallock—"I suppose your little partner is remembered in your will," to which he says that deceased replied, "Yes, that little devil will be remembered," or "has been" or words to that effect. Barrett testifies that the fact that this little girl (who was seven years old and no relation to deceased) was remembered in the will made a distinct impression on his mind and, as already remarked, this circumstance seems to have created a distinct impression on the mind of Judge Stone. Mrs. Melhase (wife of deceased) testified that in 1915, deceased had his bank boxes at home examining his papers and she said to him referring to one of the boxes, "Does that amount to all your worldly affairs?" and he answered "It probably does," and said, motioning to one of the boxes, "My will is in there." She then asked, "Who made your will?" and he answered "Stone made my will." Stone testifies that he never drew the 1908 will. An old friend of deceased, Mr. W. T. Lee, visited him at San Francisco during his last illness, and in the course of a discussion about his health and in relation to a contemplated

operation, he remarked that he "had things fixed." The testimony of this witness continues as follows:

"Q. Did he explain to you what he meant by having things fixed?

"A. Well, he said he had his will made. I said that it made no difference about a will, that what I was trying to get from him was a promise that he wouldn't let them cut him up; that the will proposition would be after he was gone. He says, 'Yes, that is true but I have made up my mind to go and have this done and I am going to do it.'

"Q. Did he refer to the will again?

"A. He said his will, and I asked him, 'Who does your work for you, Fred, along that line?' 'Why,' he says, 'Stone.' I don't know whether he said Stone and Gale or just Charley Stone. He said, 'Charley Stone has been my attorney for a long time.'

"Q. Do you mean to be understood that he told you that C. F. Stone, lawyer, made his will?

"A. Well, I mean to be understood that he left the impression with me that Stone was the man that was connected with that proposition. I wouldn't say that he told me that Charley Stone made his will, but I will say that he gave me to understand that Charley Stone had attended to his business and that he had fixed the proposition all up.

"Q. Did he tell you where his will was at that time?

"A. He said it was in Seimen's Bank."

From all these circumstances we are irresistibly drawn to the conclusion that Mr. Stone's impression and Mr. Barrett's absolute statement that Mr. Stone drew up a will for deceased in January, 1911, are correct. We have Mr. Barrett's direct testimony that it was in the usual form of wills, and that he kept a copy as a guide in making other wills. It is objected that this was in answer to leading questions, but no objections were made to the questions upon this or any other ground, and when a lawyer says that a will

was in the usual form every other lawyer and every Judge knows what he means, and the same may be said of Barrett's testimony, that the will of 1911 contained the usual clause revoking all other wills and codicils. If we assume that a will was made, and we think that fact was clearly established, it would seem natural that a lawyer of Judge Stone's wide experience and knowledge would have attached to it a revocation clause. A mere tyro at the law might omit it, but Judge Stone never would, and from his very familiarity with that kind of business he would not remember such a detail while a beginner like Mr. Barrett copying his first will would be more likely to remember every little thing connected with its proper execution.

A plausible argument is drawn by defendant from the fact that no charge for drawing the will of Fred Melhase is found upon the books of the firm of Stone and Barrett, although they disclose the fact that charges for less important services were frequently made. The circumstance is not without weight, but in the face of the other circumstances above mentioned and the direct testimony as to the occurrence it is not compelling. Nine years have passed since the alleged will was written, and there may have been a reason existing at the time but now forgotten why no charge was ever made, or if made not entered.

4. It was not necessary in this case that the petitioner should reproduce the whole substance of the second will. It is sufficient that she should clearly establish the fact that a second will was made and that it contained a clause revoking prior wills: *In re Cunningham's Will,* 38 Minn. 169 (36 N. W. 269, 8 Am. St. Rep. 650). We are of the opinion that this has been

done in the case at bar and the decree of the Circuit Court is therefore affirmed. AFFIRMED.

MR. JUSTICE MOORE, MR. JUSTICE HARRIS and MR. JUSTICE BEAN concur.

Argued February 13, affirmed March 5, 1918.

ADAMS v. PORTLAND RY., L. & P. CO.

(171 Pac. 219.)

Carriers—Carriage of Passengers—Injuries to Passengers—Negligence.

1. Where a door leading from the main compartment of the street-car to the front platform and designed to swing either way for the ingress or egress of passengers worked so hard that a passenger who was directed by the motorman to push on the door was, when she finally forced the door open, carried by the force of her push and the sudden opening out into the platform and down into the highway where she fell, the street railway company cannot defeat recovery on the ground that there was no actionable negligence, for the door, in the very nature of things, was defective.

Trial—Carriage of Passengers—Instructions.

2. In a personal injury action by passenger on street-car the refusal of instruction on contributory negligence which was not pleaded was not error, the jury being plainly charged so that they must have understood that there could be no recovery unless street railroad company was negligent and its negligence was the proximate cause of the injury.

Carriers — Carriage of Passengers — Duty to Assist Passenger in Alighting.

3. While a carrier is ordinarily under no duty to assist a passenger in alighting, it is the duty of the carrier's servants to assist a passenger where there is some unusual danger or difficulty arising from the means afforded for alighting.

[As to the rights of, and the railroad company's duties to, a passenger alighting from a train, see note in 50 **Am. Rep.** 277.]

Carriers—Carriage of Passengers—Actions—Jury Question.

4. In an action for injury received by plaintiff when she fell as the result of the sudden opening of a door on street-car furnished for egress against which she was told to push, question whether carrier's servants in charge of the car were negligent in failing to open the door, *held*, under the evidence, for the jury.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

The defendant appealed from a judgment which was awarded to the plaintiff on account of personal injuries sustained by her. The plaintiff was a passenger on one of the street-cars operated by the defendant in the City of Portland. The main room or body of the car was separated from the vestibule in the front end by a partition wall extending across the car. Built in this partition wall was a door hung on hinges. This door was made to swing either way and when closed was kept in place by friction with a spring set in the top of the casing of the door. The motorman described the spring as follows:

"There is a little spring there with a little opening in the center of it. * * The door can slip either way, and when it comes into the little opening it holds it, so that you can pull it either way through the friction."

There was also an "exit door" leading from the vestibule so that a passenger who desired to leave the car would pass from the main room or body of the car through the door in the partition wall into the vestibule and then through the exit door to the street. When the car stopped at the plaintiff's destination she attempted to open the partition door and, finding that it "worked hard and stiff" she "pushed hard" on the door with the result that it opened suddenly causing her to follow the door, as it swung on its hinges, into the vestibule and thence through the exit door into the street. The plaintiff alleges in her complaint

"that defendant was then and there careless and negligent in the following particulars, to wit: 1. That the front door, through which defendant left said car, worked hard and stiff, and would not open excepting when great exertion was applied thereto, and that when plaintiff was leaving said car, in opening the door,

she pushed the same, and by reason of the same being stiff and hard and difficult to move, it opened abruptly and suddenly, causing plaintiff to fall on to the street; 2. That said defendant, through its crew in charge of said car, carelessly and negligently failed to open the front door of said car so that plaintiff could alight from the same."

Aside from admissions of the corporate character of the defendant and that the corporation was engaged in operating a street-car system, the answer consisted of a general denial.

The plaintiff was called as a witness and testified as follows:

"Q. Well, I wish you would tell the jury when you got there, what was done, on your part.

"A. When the car stopped for the passengers to get off, and I always go out the front end of the car at that place, and the other passengers did the same. I went to open the door, but I couldn't open it, and I knocked on the glass and told the motorman—I said to the motorman, 'I can't open this door,' and he says, 'Push it; it binds,' and I pushed it—

"Q. (Interrupting.) He said what?

"A. 'Push it; it binds,' and I pushed it, and he said 'Push it harder; it binds,' and I first pushed it with one hand, but when he told me that, I pushed it with both hands, and I pushed and pushed hard, and it opened very suddenly, and the door swung out, and my hands being on the door, I followed it right along, and I landed on the pavement. I don't know hardly how I did get there, but as the door swung back, I followed it right around through the other door.

"Q. Now, you say you landed on the pavement?

"A. Yes, sir.

"Q. Just tell the jury in what position.

"A. Well, I never touched the steps. In following the door around with my hands on it, I had no way of catching hold of anything to gain my balance, and I went right over the steps and never touched them, and

I fell sitting up—and I couldn't help myself up at all. I couldn't move, when I tried to get up."

We here set down portions of the plaintiff's testimony given on cross-examination:

"Q. So that when you tried to open it by pushing it, you called then to the motorman, did you? What did you say to the motorman?

"A. I says, 'I can't open this door.'

"Q. And he said, 'Push on it'?

"A. He said, 'Push on it; it binds,' and told me that several times; to push it harder.'

"Q. And then you started to push it. Well, you knew that the door was going to open that way, didn't you?

"A. I knew it afterward.

"Q. Well, didn't you know it at the time?

"A. I didn't expect it to go so suddenly. When I gave that harder push it just went suddenly, and I had my hands on the door, and I couldn't let go and catch hold of anything to save myself; I just followed it right around with my hands on the door, and going down that little drop there was what made me fall.'

"Q. You thought it would open, didn't you?

"A. I thought it would open, yes, but I didn't know it was going to go so suddenly.

"Q. Well, you were pushing on it?

"A. Yes; I pushed on it to open the door, because I was told to, but I didn't know it was just going to just drop away in a minute so suddenly as that."

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Griffith, Leiter & Allen* and *Mr. F. J. Lonergan,* with an oral argument by *Mr. Rufus A. Leiter.*

For respondent there was a brief over the name of *Messrs. Davis & Farrell,* with an oral argument by *Mr. Wilfred E. Farrell.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The defendant takes the position that the facts pleaded in the complaint and testified to by the plaintiff do not constitute actionable negligence and that the instant case is controlled by *Goss* v. *Northern Pacific Ry. Co.*, 48 Or. 439 (87 Pac. 149). The decision in that case was rested upon the ground that there was no proof of any fact or circumstance attending the accident from which an inference of negligence could be drawn and that therefore the negligence complained of was left wholly and entirely to inference and presumption from the mere happening of the accident. In *Christensen* v. *Oregon Short Line R. Co.*, 35 Utah, 137 (99 Pac. 676, 18 Ann. Cas. 1159, 20 L. R. A. (N. S.) 255), also relied upon by the defendant, the conclusion reached by the court was predicated on the theory that there was no evidence of any defect in any appliance or instrumentality used by the company unless such defect could be inferred from the fact that the door closed while the passenger was in the act of alighting from the train after passing through the open door. If, in the instant case, the mere happening of an accident constituted the only evidence of negligence then the plaintiff could not prevail. However, the plaintiff offered evidence of more than the mere happening of the accident; she testified to the attendant circumstances which, if true, constitute actionable negligence. The door was designed to swing either way so that passengers could pass through it upon entering or when leaving the car. The door was installed for the use of the plaintiff and all other passengers and she had the right to use it for the purpose for which it was installed. Moreover, she pushed on the door in response to an express invitation of the defendant. If

the door worked hard as the plaintiff says it did and if she could not open the door except by pushing it as she claims she did then it is obvious that the door was an improper one and that the defendant failed to perform the duty required of it by the law. The defendant made no attempt to show that the spring was examined after the accident and found to work properly. If the testimony of the plaintiff is to be believed then in the very nature of things either the spring or the door itself was defective: *McCarty* v. *St. Louis S. Ry. Co.*, 105 Mo. App. 596 (80 S. W. 7). It was not error for the court to refuse to grant the motions for a nonsuit or to decline to direct a verdict for the defendant.

2. The court did not commit prejudicial error in refusing to instruct the jury upon contributory negligence. The defendant did not plead contributory negligence as a defense. The pleadings made no issue upon that question. Nor was the evidence such as to entitle the defendant successfully to claim that it was injured by the refusal of the court to charge the jury upon contributory negligence, even though it be assumed, without deciding, that an instruction upon contributory negligence might sometimes be proper even in the absence of an answer pleading it as a defense: *Dunn* v. *Orchard Land Co.*, 68 Or. 97, 103 (136 Pac. 872). When the verdict is examined in the light of the instructions actually given it will plainly appear that the jury must have understood that the plaintiff could not recover unless she showed that the defendant was negligent and that such negligence was the proximate cause of the injury.

3, 4. The complaint accuses the defendant of negligence because the crew in charge of the car failed to open the door so that the plaintiff could alight from the car. It is true that, stated generally, the carrier is

under no duty to assist a passenger in alighting. But there are exceptions to this general rule: 1 Nellis on Street Railways (2 ed.), § 304; as where there is some unusual danger or difficulty arising from the means afforded for alighting: 6 Cyc. 611; 10 C. J. 932. Strictly speaking the plaintiff was not injured while alighting from the car. She was attempting to go from the main room to the vestibule so that she could then alight from the car. According to the testimony of the plaintiff the motorman had knowledge of the condition of the door; he was made aware of the difficulty which she was experiencing in attempting to open the door; and instead of assisting her to open the door the motorman instructed her what to do and she followed his instruction. Assuming the facts to be as testified to by the plaintiff it was not error to permit the jury to consider the second specification of negligence.

On the whole record we think the defendant had a fair trial and that it was not prejudiced by anything occurring at the trial. The judgment is therefore affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Submitted on briefs February 26, affirmed March 5, 1918.

PRATT v. GIBSON.

(171 Pac. 223.)

Appeal and Error—Absence of Bill of Exception—Extent of Review.

1. No bill of exceptions accompanying transcript and defendant's assignments being that court erred in overruling demurrer to complaint and in refusing and in giving instructions, the only matter which will be considered on appeal is the ruling upon demurrer; the objection that a complaint does not state facts sufficient to constitute a cause of action never being waived under Section 72, L. O. L.

Animals—Injuries—Complaint—Sufficiency.

2. A complaint alleging that plaintiff was the owner of and entitled to possession of one Jersey bull calf of the age of five months worth $100, and that defendants caught said calf and castrated him, to the damage of plaintiff in the sum of $100, was sufficient.

[As to liability for injuries by and to animals, see notes in 16 Am. St. Rep. 631; 36 Am. St. Rep. 831.]

From Crook: T. E. J. DUFFY, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This action was commenced by Alice D. Pratt in a Justice's Court of Crook County, Oregon. The complaint reads:

"Comes now the above-named plaintiff, and for cause of action against the above-named defendants, complains and alleges as follows, to wit: 1. The plaintiff complains and alleges that on or about the 25th day of March, 1916, in Crook County, Oregon, the plaintiff was the owner of and entitled to the possession of one Jersey bull calf of the age of about five months; that said calf was sired by pure bred Jersey bull out of an extra good high-grade Jersey milk cow; that said calf was of the value of $100.00.

"2. The plaintiff alleges that the above-named defendants, Joe Gibson, Grover Gibson, Ralph Gibson, and Earnest Gibson, acting together caught the above mentioned calf and castrated him on the 25th day of March, 1916, at their ranch in Crook County, Oregon,

to the damage of the plaintiff in the sum of $100 (one hundred dollars)."

Judgment was demanded for that amount and for the costs and disbursements of the action.

The answer is as follows:

"Comes now the defendants in the above-entitled action and admit, denies and alleges as follows, to wit: We admit all of section 1 (one) of the plaintiff's complaint, except the alleged value of the calf. We deny each and every allegation of section 2 (two) of plaintiff's complaint, and allege that we neither acting together nor single handed did castrate nor in any way harm any calf belonging to the above-named plaintiff."

Judgment was demanded for the costs and disbursements.

The cause was tried in that court and a verdict was returned in plaintiff's favor and against Joe Gibson alone for $75, as damages, and a judgment therefor and for the costs and disbursements having been rendered, he appealed to the Circuit Court for that county. He interposed in that court a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against him. The demurrer was overruled and the cause being retried resulted in a like verdict and judgment. Upon motion, however, it was ordered that unless the plaintiff remitted $37.50 of the sum so recovered, the judgment should be set aside and a new trial granted. This condition was complied with and from the amended judgment the defendant against whom the judgment was given appeals to this court. AFFIRMED.

For appellant there was a brief submitted by *Mr. N. G. Wallace.*

For respondent there was a brief over the name of *Mr. Jay H. Upton.*

MR. JUSTICE MOORE delivered the opinion of the court.

1, 2. The transcript filed herein contains a copy of the demurrer, duplicates of the orders made by the Circuit Court, copies of the verdict, the judgment, the notice of appeal, the undertaking therefor, the exception to the sufficiency of the sureties thereon, and the ruling of the court in relation thereto, to which the certificate of the clerk is appended. There have also been sent up the original papers filed in the Justice's Court and copies of orders made therein to which the clerk also attaches his certificate. No bill of exceptions, however, accompanies the transcript.

The appellant's counsel assigns as errors alleged to have been committed by the trial court its action in overruling the demurrer, its refusal to instruct the jury as requested, and its giving of instructions to which exceptions were taken. None of these matters are properly before us for consideration, except the ruling upon the demurrer, for the objection that the complaint does not state facts sufficient to constitute a cause of action is never waived: Section 72, L. O. L. An examination of the averments of the complaint, as hereinbefore set forth, will show that the initiatory pleading is sufficient in all particulars. The judgment should therefore be affirmed, and it is so ordered.

AFFIRMED.

Argued February 15, affirmed March 5, 1918.

PATTEE *v.* HARBAUGH.

(171 Pac. 221.)

Chattel Mortgages—Execution—Priority—Statutes.

1. Section 7407, L. O. L., having been enacted after Section 799, prevails in case of any repugnancy as regards priority between unrecorded chattel mortgage, without delivery and change of possession, and subsequently levied executions.

Chattel Mortgages—Priority—Execution—Statutes.

2. Execution creditors being classified by Sections 233, 301, L. O. L., as purchasers in good faith, as against third persons, are protected by Section 7407, subsequently enacted, declaring unrecorded chattel mortgages, without delivery and change of possession of property, void as against subsequent purchasers in good faith.

[As to effect of failure to record chattel mortgage, see note in 137 Am. St. Rep. 471.]

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

Plaintiff held an unrecorded chattel mortgage on some grain, consisting of wheat and oats, to secure a valid subsisting debt. The property remained in the possession of the debtor. Two executions based upon regular and valid judgments were placed in the hands of the defendant as constable. Without any knowledge of the mortgage he levied both executions upon the grain and sold it in satisfaction of the judgments. Plaintiff then began this action to recover the property or its value. Issues having been joined and a trial had, there was a judgment for defendant, and plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. H. E. Slattery.*

For respondent there was a brief and an oral argument by *Mr. L. M. Travis.*

MR. JUSTICE BENSON delivered the opinion of the court.

1, 2. There is no controversy as to the facts. We are simply called upon to say which party upon the agreed facts is entitled to prevail. The problem is one of statutory construction. The earliest legislation in Oregon upon the subject is found in the Code of 1855, at page 528, which makes unrecorded chattel mortgages "void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith," unless there is an immediate delivery and actual continued change of possession of the property. This statute was expressly repealed in 1862, and at the same session the legislature enacted what is Section 799, L. O. L., of which Subsection 40 provides that such an unrecorded mortgage creates a presumption of fraud as against the creditors of the seller or assignor or as against subsequent purchasers in good faith. At the same session Section 301, L. O. L., became a law, declaring that attaching creditors as against third persons are to be deemed purchasers in good faith, and likewise Section 233, L. O. L., providing *inter alia* that in execution proceedings "property shall be levied on in like manner and with like effect as similar property is attached."

In 1893, the law of 1855, above referred to, was in substance re-enacted, omitting, however, the words "as against the creditors of the mortgagor," and so the law now stands as Section 7407, L. O. L. Plaintiff contends that by virtue of the provisions of Section 799, L. O. L., he is entitled to prevail upon showing the good faith of the transactions resulting in the mortgage, and that Section 7407 is not available to defendant for the reason that creditors are not protected thereby. It will be observed that Section 799 refers

not only to mortgages, but to absolute sales as well, whereas, the later statute, 7407, applies exclusively to mortgages and if they be repugnant in any of their parts the later legislation must prevail as to such conflicting portions. Referring to the failure to mention creditors of the mortgagor in Section 7407, L. O. L., it is sufficiently answered by calling attention to the fact that when the law of 1855 was passed attachment and execution creditors were not classified as purchasers in good faith, but were so designated by statute in 1862, and when the act of 1893 (Section 7407, L. O. L) was framed it would have been a needless iteration expressly to have named creditors of the mortgagor, since they were elsewhere declared to be purchasers. We conclude that there was no error in the determination reached by the trial court and the judgment is therefore affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE BEAN concur.

Argued January 29, reversed February 13, rehearing denied March 5, 1918.

SANFORD *v.* PIKE.

(170 Pac. 729; 171 Pac. 394.)

Evidence—Presumption as to Continuance of Situation.

1. Where, when a trustee's account with a bank was opened, all of the funds belonged to the beneficiaries, the presumption is that such situation continued.

Trusts—Right of Trustee to Beneficiaries' Funds—Evidence.

2. If a trustee who opened a bank account with his beneficiaries' funds thereafter is to be entitled to treat the funds as his own, he must establish his right to them by unequivocal proof.

Setoff and Counterclaim—Capacity in Which Defendant Holds.

3. A lawful setoff must be based on a claim held by defendant in the same right as that in which he is sued.

Setoff and Counterclaim—Setoff by Trustee—Illegality.

4. An agreement between a trustee and the bank, which had a deposit of his individual funds and the funds of his beneficiaries, that a claim of the trustee as such be set off against a claim against him in his individual capacity would be unlawful, in the absence of consent by the *cestuis que trustent.*

Setoff and Counterclaim—Claim in Favor of One Partner—Setoff Against Firm.

5. A claim in favor of one partner cannot be set off against a partnership obligation, in the absence of agreement by all parties that the setoff shall be available.

[Right to set off partnership debt against claim by individual partner, see note in **Ann. Cas.** 1915C, 809.]

ON PETITION FOR REHEARING.

Bills and Notes—Action—Defenses—Want of Consideration—Pleading.

6. The petition, in action on a note, alleging an indebtedness in settlement of which the note was given, and the answer not denying this, but, though alleging want of knowledge of the exact amount of the indebtedness, pleading a setoff, the defense of want of consideration is not available.

Setoff and Counterclaim—Claim in Favor of One Partner—Setoff

7. A fund constituting an asset in which others than defendants are interested, and rights in which have not been segregated, cannot be used by way of setoff.

From Coos: GEORGE F. SKIPWORTH, Judge.

Suit by S. A. Sanford against W. E. Pike, Hannah P. Pike, P. L. Phelan, W. B. Hammitte and First National Bank of Roseburg, a corporation, in which suit there was a decree in favor of the bank, and plaintiff and the defendant, First National Bank, appeal. Reversed and decree entered.

Department 1. Statement by MR. JUSTICE MCCAMANT.

This is a suit brought to foreclose a deed of trust executed by the defendants Pike to secure an indebtedness of $13,500 owing by them. The deed ran to T. R. Sheridan as trustee for the First National Bank of Roseburg and was assigned by him to plaintiff. When the deed was executed, it was the belief of the defendants that the entire debt secured was held by the First

National Bank of Roseburg. It subsequently transpired that $4,000 of the debt belonged to the defendant W. B. Hammitte, who held one of the notes making up the aggregate of $13,500. Hammitte never authorized or ratified the taking of the deed of trust as security for his share of the debt and was awarded no relief in the lower court except a judgment for costs.

The defendants Pike admit that they executed a note to the First National Bank of Roseburg for $13,500 under date of April 15, 1910, signed by W. E. Pike & Co. The partnership consisted of the defendants W. E. Pike and Hannah P. Pike. There is no dispute that this sum is the balance of a debt at one time owing by W. E. Pike and another to the bank. The answer pleads no payments in addition to those admitted in the complaint. The substance of the defense is found in the following allegations of the answer:

"Defendants further allege that said trust deed was executed under the following circumstances, to wit: At said date and long prior thereto the defendant, W. E. Pike, as Trustee, had an open running account with the First National Bank of Roseburg, and had deposited large sums of money with said bank and there was at the time of the execution of said trust deed a large amount of money due from said bank to said W. E. Pike, Trustee, but said account had never been settled or adjusted and there were large amounts of interest due thereon which had never been computed or settled, and at the time of giving said trust deed the defendant, W. E. Pike, was the owner of the greater portion of said account standing in the name of W. E. Pike, Trustee, and the defendant, Hanna P. Pike, was one of the beneficiaries of said trust account and said trust account had become at that time the property of said defendants, with the exception of about two thousand five hundred dollars, and it was at that time agreed between these defendants and said First Na-

tional Bank, acting through the said T. R. Sheridan, its president, that said trust account should be audited, computed and adjusted, as soon as the employees of said Bank could perform the necessary clerical work, and credits that might appear therefrom should be given so that all of the claims existing between these defendants and said First National Bank should be settled in full. Defendants further allege that said First National Bank and said T. R. Sheridan have entirely failed to carry out said agreement and no statement of said trust account has ever been rendered to these defendants or to said Trustee, except partial accounts rendered from time to time, which did not purport and which were not intended to be complete statements of the account between said Bank and said Trustee, but these defendants allege that a true statement of said account is hereto annexed, marked Exhibit 'A' and made a part hereof, and that there is now due upon said account from said First National Bank of Roseburg, to W. E. Pike, Trustee, the sum of $16,826.04 and that said account is now the property of these defendants, with the exception of a sum amounting to about two thousand five hundred dollars."

"Defendants further allege that at the time of the giving of the trust deed referred to in Paragraph 5 hereof there was in truth and in fact nothing due from these defendants, or either of them, to said First National Bank of Roseburg, nor to said T. R. Sheridan, and a full accounting at that time would have shown a balance due to these defendants, and the supposed consideration in said trust deed has entirely failed but these defendants were induced to sign said trust deed for the purpose of securing to said First National Bank of Roseburg any balance which might be found to exist in its favor, but in truth and in fact there was nothing due said Bank at said time and if said Bank and said Sheridan had at that time furnished these defendants a complete statement of their account, including the account standing in the name of W. E. Pike, Trustee, it would have been ascertained at that time, that there was nothing due from these defendants, but these defendants, being unable to ascertain

a true statement of said account at said time, were induced to believe and did believe that there was at that time a large sum due from these defendants to said Bank."

The lower court found for plaintiff, but subsequently set aside the decree in plaintiff's favor and entered a decree against the First National Bank in the sum of $7,776.24. From this latter decree plaintiff and the defendant bank appeal.

REVERSED AND DECREE RENDERED.

For appellants there was a brief and an oral argument by *Mr. Oliver P. Coshow.*

For respondents there was a brief over the names of *Mr. Austin S. Hammond* and *Mr. E. B. Sperry,* with an oral argument by *Mr. Hammond.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

It clearly appears that the debt for the security of which the deed of trust was given was owing individually by the defendant W. E. Pike and that the defendant Hannah P. Pike consented that the note of the partnership should be given for it. Both of said defendants executed the deed of trust covering their individual property, to secure this debt.

It also appears that the defendant W. E. Pike was guardian of five minor heirs of the Kinnicutt Estate and was trustee of the funds of four of the heirs who were of age. Moneys which he held in this fiduciary capacity to the amount of $34,613.30 were deposited by him in the defendant bank. The fiduciary character of the funds was disclosed to the bank when the deposit was made; the deposit was carried to the credit of "W. E. Pike, Trustee of the Kinnicutt Estate of

Myrtle Point." The disputed questions of fact have to do with the condition of this account, the defendants Pike contending that there is a large credit balance therein. Plaintiff contends that the doctrine of *Dove* v. *Hayden,* 5 Or. 501, *Burrage* v. *Bonanza G. & Q. Min. Co.,* 12 Or. 169 (6 Pac. 766), and *Le Clare* v. *Thibault,* 41 Or. 601 (69 Pac. 552), forbids the assertion in this suit of the counterclaim alleged in the answer. The defendants Pike disclaim the intention to set up a counterclaim; they contend that their pleading avers want of consideration for the note sued on.

1, 2. The defendant W. E. Pike testified that he had settled with his *cestuis que trustent* from time to time and that on June 29, 1915, when he testified, there was due to the beneficiaries only the sum of $3,220.32. There is no testimony as to the state of his account with his beneficiaries at the time when the note was given or when the deed of trust was executed, or when the answer was filed. When the account was opened, all of the funds belonged to the beneficiaries and the presumption is that this continued to be the situation. If the defendant W. E. Pike is to treat these funds as his own, he must establish his right to them by unequivocal proof. The testimony fails to show that there was ever a segregation of the moneys on deposit, those belonging to W. E. Pike being separated from those belonging to the Kinnicutt heirs.

3. Waiving the questions of procedure pressed upon our attention by appellants, we think the facts above recited are fatal to the defense set up in the answer. A lawful setoff must be based on a claim held by defendant in the same right as that in which he is sued: *Dray* v. *Bloch,* 29 Or. 347, 353 (45 Pac. 772). The defendant W. E. Pike cannot pay his debt with the money of his wards. "The court will not allow, much less

aid, a guardian to apply the estate of his wards to the discharge of his individual indebtedness'': *Dobyns* v. *Rawley,* 76 Va. 537, 542; *Gansner* v. *Franks,* 75 Mo. 64; *Gallagher* v. *David Stevenson Brewing Co.,* 13 Misc. 40 (34 N. Y. Supp. 94); *Robertson* v. *Garshwiler,* 81 Ind. 463, 464. If this defendant is to be treated as a trustee, the rule is the same; *Lewis* v. *Pickering,* 58 Neb. 63 (78 N. W. 368). This case closely resembles the instant case in its facts.

4. If the answer be construed as alleging an agreement between Pike and the bank that one claim was to be set off against the other, the allegations are not sustained by the proof. In the absence of consent by the *cestuis que trustent* such an agreement would be unlawful: *Dobyns* v. *Rawley,* 76 Va. 537, 542; *Jeffray* v. *Towar,* 63 N. J. Eq. 530, 540 (53 Atl. 182).

5. The deed of trust was given to secure a partnership note. If the claim against the defendant bank be treated as the sole property of W. E. Pike, he is not entitled to allege it by way of setoff or recoupment in this suit. A claim in favor of one partner cannot be set off against a partnership obligation: 25 Am. & Eng. Enc. Law (2 ed.), 578, 579; *Rogers* v. *McMillen,* 6 Colo. App. 14 (39 Pac. 891); *Olive* v. *Morgan,* 8 Tex. Civ. App. 654, 656 (28 S. W. 572); *Pope Mfg. Co.* v. *Charleston Cycle Co.,* 55 S. C. 528 (33 S. E. 787); in the absence of an agreement by all parties that the setoff shall be available: *McDonald* v. *Mackenzie,* 24 Or. 573, 575 (14 Pac. 866). See, also, *Schade* v. *Muller,* 75 Or. 225, 230 (146 Pac. 144).

It follows that the decree of the lower court is reversed and a decree will be entered here foreclosing the deed of trust. Plaintiff will have judgment for the face of the note and taxes paid as alleged in the twelfth paragraph of the complaint, with interest. The de-

fendants Pike will have credit for the amount of the Hammitte note and also for the payments admitted in paragraphs 11 and 12 of the complaint.

The parties stipulated for an attorneys' fee of $750 in case plaintiff should recover the full amount demanded. This stipulation will be followed. The decree will be without prejudice to the claim of W. E. Pike, Trustee, against the defendant bank, and the claim of W. B. Hammitte against W. E. Pike and P. L. Phelan. REVERSED AND DECREE RENDERED.

REHEARING DENIED.

MR. JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Denied March 5, 1918.

ON PETITION FOR REHEARING.

(171 Pac. 394.)

Mr. A. S. Hammond and *Mr. E. D. Sperry,* for the petition.

Mr. Oliver P. Coshow, contra.

Department 1. MR. JUSTICE MCCAMANT delivered the opinion of the court.

6. In a petition for a rehearing the defendants Pike again press upon us their contention that the note sued on was without consideration to support it. It is contended that even if the account standing to the credit of Pike, trustee, be disregarded, there was no debt owing from the defendant W. E. Pike to the bank at the time when his firm executed the note secured by the

deed of trust. This contention is not available to these defendants under the pleadings.

It is alleged in the complaint:

"That at said time the above-named defendant W. E. Pike and P. L. Phelan were indebted to The First National Bank and one W. B. Hammitte in a large sum of money, to wit, in excess of eighteen thousand ($18,000) dollars. That by the terms of an arrangement and settlement between said W. E. Pike and said P. L. Phelan the said P. L. Phelan assumed four thousand eight hundred eighty-three ($4,883) dollars of said indebtedness and gave his note therefor to the plaintiff, securing the same by a mortgage on real property situate in Coos County, Oregon, and the defendant W. E. Pike gave to The First National Bank of Roseburg, Oregon, his note bearing date of April 15, 1910, that being the date of the alleged settlement between said Pike and said Phelan, for the sum of thirteen thousand five hundred ($13,500) dollars."

The corresponding portion of the answer is as follows:

"Answering the allegations contained in paragraph 2 of plaintiff's complaint defendants admit that at about the time alleged a settlement was had between W. E. Pike and P. L. Phelan, substantially as alleged in said paragraph 2, and that the defendant Pike executed a note set out in said paragraph, but defendants allege that they had no knowledge of, and no dealings with W. B. Hammitte and cannot state exact amount due or owing to The First National Bank, at said date."

The complaint plainly alleges an indebtedness to the bank and to Hammitte of $13,500. This allegation is not denied. It clearly appears that Hammitte's share of the debt was $4,000 and the defendants Pike therefore admit a debt due to the bank amounting to $9,500.

The gist of the defense asserted by the answer is stated in the extracts quoted in the former opinion.

It plainly appears that the pleader claimed for the defendants Pike the right to set off against their debt to the bank the balance in the Pike trustee account. The claim that there was nothing due the bank is based on the contention that the credit due Pike, trustee, is greater than the debt evidenced by the note sued on.

7. It is of no consequence that Mrs. Pike is one of the Kinnicutt heirs and therefore one of the beneficiaries in the trust. It appears by the testimony of W. E. Pike that two of the beneficiaries had not been settled with when the case was tried. The amount due these beneficiaries has not been segregated from the amount which W. E. Pike claims as his own. The fund was therefore an asset in which others than these defendants were interested. Such a fund cannot be used by way of setoff to pay the debts of the defendants Pike. A relaxation of this rule would lead to intolerable abuses.

It is finally contended in the petition for rehearing that the question on which the case turns under the former opinion is not raised by the pleadings. The portions of the answer quoted in the opinion are not separately stated as an affirmative defense to the suit and that may be the reason why plaintiff failed to attack them by demurrer. Issue is joined on these allegations by the reply and plaintiff in his brief and in his oral argument contended that the setoff pleaded by the defendants Pike is unavailable to them. This contention is supported chiefly by arguments which we have not found it necessary to pass on. Error is assigned on the findings of the Circuit Court which gave the defendants Pike credit for the balance in the Pike trustee account, and especially on a finding that the amount with which the defendant bank is charged was due to W. E. Pike individually. The question de-

cided in the former opinion is the controlling question in the case and it is squarely presented by the record before us.

The petition for rehearing is denied.

REHEARING DENIED.

MR. JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued February 20, affirmed, except as to costs, March 5, 1918.

CITY OF SEASIDE *v.* OREGON SURETY & CASUALTY CO.

(171 Pac. 396.)

Municipal Corporations—Bond of City Treasurer—Essentials.

1. A bond of a city treasurer, providing that the surety shall make good any loss sustained by the city by any act of fraud or dishonesty of the treasurer amounting to larceny, was sufficient; it not being necessary to detail in the bond the treasurer's duties fixed by law.

Municipal Corporations—Bond of City Treasurer—Larceny.

2. That the money appropriated by the city treasurer to his own use passed through the vaults of a bank of which he was cashier did not render the funds not a subject of larceny within his official bond securing against larceny.

Appeal and Error—Exclusion of Evidence—Invited Error.

3. Where tendered evidence was excluded upon solicitation of defendant, defendant cannot complain.

Municipal Corporations—Treasurer's Bond—"Larceny."

4. A bond of a city treasurer, agreeing to make good any loss sustained by the city by any act of fraud or dishonesty of the treasurer amounting to "larceny," included larceny as defined by Section 1957, L. O. L., as to conversion of public money.

[As to what constitutes larceny, see notes in 57 **Am. Dec.** 271; 88 **Am. St. Rep.** 559.]

Interest—Accrual of Right—Unliquidated Demand.

5. Under Section 6028, L. O. L., providing for interest on money received for the use of another and retained beyond a reasonable time, in an action on an official bond of a defaulting city treasurer not stipulating for interest, there could be no recovery of interest until after judgment; the amount of liability not having been ascertained or agreed upon.

Costs—Disbursements of First Trial.

6. Where defendant secured an erroneous decision on the first trial, which decision was set aside on plaintiff's motion, plaintiff, who secured judgment on the second trial, was entitled to disbursements incurred at the first trial under Section 566, L. O. L., providing that party entitled to costs shall have allowed all necessary disbursements.

Witnesses—Attendance Outside of County—Mileage.

7. Under Section 3145, L. O. L., entitling witnesses to mileage at the rate of 10 cents a mile in going to and returning from the place of service except in counties of 50,000 inhabitants, where the rate is fixed at 5 cents, a witness from a county of the first class, attending court in a county of the latter class by order of the court, would be entitled to double mileage at the rate of 5 cents only.

Constitutional Law—Witnesses—Reversals and Annuities.

8. Section 3145, L. O. L., entitling witnesses to mileage at the rate of 10 cents a mile except in counties of 50,000 inhabitants, where the rate is fixed at 5 cents, applies to all citizens, and is not inimical to Article I, Section 20, of the Constitution, providing that no law shall be passed granting to any citizen privileges of annuities, which upon the same terms shall not equally belong to all citizens.

From Multnomah: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action brought by the plaintiff, City of Seaside, a municipal corporation, to recover the sum of $7,949.09 together with interest thereon at the rate of 6 per cent per annum from November 4, 1910, upon a bond to insure the fidelity of E. N. Henninger, as treasurer of Seaside, during his term of office of two years. It was executed and delivered by E. N. Henninger and the Union Guarantee Association to the plaintiff on March 9, 1910, and later, the defendant, Oregon Surety & Casualty Company, took over the business of that association and assumed all the liabilities upon the bond. The cause was tried by the court and jury. Judgment went for the plaintiff for the principal amount claimed without interest. Defendant appeals from the principal judgment and as to certain costs. Plaintiff also appeals from that part of the judgment denying it interest. A former appeal

of this case was taken to this court, see 80 Or. 345 (157 Pac. 150), wherein a clear statement of the issues was fully made. We will therefore refer only to those directly involved herein. Among its several provisions the instrument recites the following:

"WHEREAS, Edmund N. Henninger, hereinafter called the 'Employee,' has been appointed to the position of Treasurer in the service of the Town of Seaside, Oregon, hereinafter called the 'Employer,' and has been required to furnish a bond for his honesty in the performance of his duties in the said position. * *

"NOW THEREFORE, in consideration of the sum of One Hundred Five and 00–100 Dollars, paid as a premium for the period from March the 9th, 1910, to March the 9th, 1912, at twelve o'clock noon, and upon the faith of the said statement as aforesaid by the Employer, which the Employer hereby warrants to be true, it is hereby agreed and declared, that subject to the provisions and conditions herein contained, which shall be conditions precedent to the right on the part of the Employer to recover under this Bond, the Association shall, within three months next after notice, accompanied by satisfactory proof of a loss as hereinafter mentioned, has been given to the Association, make good and reimburse to the Employer all and any pecuniary loss sustained by the Employer, of money, securities, or other personal property in the possession of the Employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said Employee in the discharge of the duties of his office or position as set forth in said statement referred to, amounting to larceny or embezzlement, and which shall have been committed during the continuance of this Bond, or any renewal thereof, and discovered during said continuance, or within six months thereafter, or within six months from the death or dismissal, or retirement of the Employee from the service of the said Employer. PROVIDED always that said Association shall not be liable, by virtue of this Bond, for any mere error of judgment or injudicious exercise of discretion on the part of said Employee, in and

about all or any matters wherein he shall have been vested with discretion, either by instruction or rules and regulations of the said Employer. And it is expressly understood and agreed that the said Association shall in no way be held liable hereunder to make good any loss that may accrue to the said Employer by reason of any act, or thing done, or left undone, by said Employee, in obedience to, or in pursuance of any discretion, instruction or authorization conveyed to and received by him from said Employer, or its duly authorized officer in its behalf; and it is expressly understood and agreed that the said Association shall in no way be held liable hereunder, to make good any loss by robbery, or otherwise, that the said Employer may sustain, except by direct act, or connivance of said Employee. * * The Associations shall not in any wise be responsible to the Employer under this Bond, to a greater extent than Fifteen Thousand and 00–100 ($15,000.00) Dollars. * * it being the true intent and meaning of this Bond that the Association shall be responsible only as aforesaid, for moneys, securities or property diverted from the Employer through fraud or dishonesty, amounting to larceny or embezzlement as aforesaid on the part of the Employee within the period specified in this Bond, while in the discharge of the duties of the office or position to which he has been elected or appointed. * * "

The plaintiff seeks to recover because the city treasurer as alleged in the complaint

"wrongfully and unlawfully embezzled and failed to account for and failed to pay over to the plaintiff or the successor in office of said E. N. Henninger, the full sum of $7,949.09, which said sum of money the said E. N. Henninger as such treasurer wrongfully and unlawfully stole and embezzled."

The evidence tended to support the averments of the complaint and to show that Henninger, as treasurer, on or about November 4, 1910, "had received and not paid out the sum of $7,949.09." Henninger was

cashier of the Bank of Seaside and committed suicide on November 4, 1910. After this action was commenced the receiver of the bank paid a dividend of ten and one-tenth per cent and the city received $775 on that account. The jury returned a verdict in favor of the plaintiff in the sum of $7,174.09, principal, and the further sum of $2,606.50, interest thereon. Judgment was duly entered upon this verdict but upon motion to set aside the verdict and judgment the court modified the judgment as to the item of interest and entered judgment in favor of the plaintiff and against the defendant in the sum of $7,174.09, and costs and disbursements taxed at $432.65.

AFFIRMED, EXCEPT AS TO COSTS.

For appellant there was a brief over the names of *Messrs. Wilbur, Spencer & Beckett, Mr. Frank Spittle* and *Mr. F. C. Howell,* with an oral argument by *Mr. S. C. Spencer.*

For respondent there was a brief over the names of *Mr. George C. Fulton, Mr. A. C. Fulton* and *Mr. Victor J. Miller,* with an oral argument by *Mr. George C. Fulton.*

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant contends that the policy only guaranteed the honesty and integrity of Henninger as treasurer, and did not insure the repayment of the fund to the city in any event or provide against technical or statutory larceny as is provided in Section 1957, L. O. L. The plaintiff contends that because of that section the defendant was liable upon the policy when the treasurer did not repay the sum received by him, and the trial court so ruled and charged that larceny as mentioned in the obligation of defendant included

the definition of larceny contained in Section 1957, L. O. L. At the close of plaintiff's case counsel for defendant moved the court for a judgment of nonsuit which was denied. Defendant offered no evidence. A request was made that the court instruct the jury to return a verdict in favor of defendant, and also in accordance with defendant's theory of the case. This was refused. These rulings are assigned as errors.

The charter of the City of Seaside required the city treasurer to give a bond with surety in the sum of $15,000, but did not provide the form nor detail the conditions of such obligation. Defendant urges that the instrument is not a bond as required by the charter, but has only the force of a common-law bond; that the defalcation of the city treasurer does not come within the terms of the bond in that the failure to account for or pay over the money in his hands belonging to the city does not constitute fraud or dishonesty amounting to larceny or embezzlement. This contention was disposed of upon the former appeal by the opinion of Mr. Justice BENSON (80 Or. 345, 354, 157 Pac. 152, 153), where in anticipation of a new trial herein in expressing the view of this court as to whether the larceny defined in Section 1957, L. O. L., is covered by the language of the bond, the learned justice said:

"As we read this statute, it provides that when a public officer receives public moneys, the burden is upon such officer to pay the money to the party entitled thereto or to so account for it as to free his own skirts of dishonesty. Failing to do this, the *animus furandi* is a legitimate inference."

1. We reaffirm the terse and plain announcement made as a direction for the trial that has since been had in this cause wherein it was shown that as city treasurer, E. N. Henninger, received the sum of $7,949.09 be-

longing to the plaintiff city and failed to pay the same to the plaintiff or to anyone for it or to account for the same in any manner. No evidence was offered tending to show that the public funds were lost or destroyed in any innocent way. No conclusion can be drawn from the facts in evidence except that the city treasurer was guilty of larceny of public money as defined by the statute. By the explicit terms of the obligation of the defendant company by whatever name the instrument may be called, the obligor is required to pay to the city the sum so lost by the dishonesty of its official. By the recitation of the memorandum in writing it is apparent that it was executed with a view to conforming to the requirements of the city charter, and we think it is presumed that the statute of this state in regard to larceny of public money was also contemplated. Perhaps it may be said that the document is a kind of blanket agreement spread over a large area and was intended as a sort of "cure for all ills"; yet when the pertinent part is sifted out of the verbiage we find that in consideration of the premium mentioned "it is hereby agreed and declared" that "the association shall within" the time specified

"make good and reimburse to the employer (the city) all and any loss sustained by the employer * * of money, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employee in the discharge of the duties of his office or position as set forth in said statement referred to, amounting to larceny or embezzlement, and which shall have been committed during the continuance of this bond."

The association shall not be responsible under this bond for more than $15,000. It seems to us that the

obligation is just as efficacious as though the usual words "are held and firmly bound" had been employed. The obligation of the association is plain. The written instrument shows that Henninger was treasurer of the city. The law fixes his obligations and it was unnecessary to detail the same in the bond. There was no error in denying the motion of defendant for a nonsuit and refusing to direct a verdict for defendant.

It is contended by counsel for defendant that the words of the contract "fraud or dishonesty amounting to larceny or embezzlement" mean the dishonest conduct of the treasurer, which is equivalent to larceny or embezzlement; that the contract "cannot mean conduct which does not involve a crime, nor does it involve a crime statutory or otherwise, in which there is absent the element of fraud or dishonesty." This claim may be wholly conceded. It is only necessary to refer again to the law of this case as declared in the former opinion where it was held that the allegation of the complaint as to the violation of Section 1957 by the larceny of the city's money constitutes fraud and dishonesty. The evidence in the case shows *prima facie* a crime on the part of Henninger. It has not been explained or refuted so "as to free his [Henninger's] own skirts of dishonesty."

In *Rankin* v. *United States Fidelity & Guaranty Co.*, 86 Ohio St. 267 (99 N. E. 314), cited by defendant, the court had under consideration the terms of a bond precisely the same as those in this case. It was held that

"when the terms of a bond clearly indicate the intention of the obligor and obligee that there shall be an indemnity to the latter on account of the default of an employee, doubtful terms will be so construed as to effectuate rather than to defeat that intention."

It might be apropos to quote with suggestiveness of application from page 317 of that opinion, namely, that

"a decision in favor of the Guaranty Company upon this ground would imply that its business in this state consists in the collection of premiums."

2, 3. The contention of defendant that the defalcation of Henninger did not amount to larceny under our statute is made upon the theory that he was cashier of the Bank of Seaside and deposited the city's money in the bank and it failed. The evidence tended to show, however, and the jury found that Henninger as cashier received and disbursed the money for the bank for a long time before it closed its doors; that but a small percentage of the money remained in the bank when Henninger committed suicide and that he had appropriated the same to his own use. The fact that the money passed through the vault of the bank would not render it not the subject of larceny. When Mr. F. S. Godfrey, receiver for the defunct bank, was on the witness-stand, for the purpose of showing that Henninger who was cashier of the bank and received and paid out all of its money was responsible for the wrecking of the bank, plaintiff's counsel asked the witness: "How much money was in the bank at the time it closed its doors, if you know?" Upon objection of counsel for defendant as irrelevant the answer was excluded. Thereupon counsel for plaintiff offered to prove by the evidence and stated that the witness would testify that at the time he was appointed receiver of the Bank of Seaside and took charge of it, which was very shortly after and within two days after E. N. Henninger committed suicide, there was less than $500 in the bank vaults; that the bank had received on open accounts deposits aggregating $70,000,

and was indebted to that amount at the time the bank was closed. Upon objection of defendant's counsel the tender of the evidence was rejected. Under this state of the record the defendant as Henninger's sponsor, cannot claim any advantage by contending that the evidence shows that the money in question was paid to Henninger at the bank and that he deposited it in the bank or that the loss was occasioned by the failure of the bank. The evidence in regard to the transaction at the bank having been kept from the jury at the solicitation of defendant we are of the opinion that that feature of the case is not before this court. If there was any error in this respect it was invited by the defendant and it cannot complain: *Caldwell Bk. & T. Co.* v. *Porter,* 52 Or. 318, 331 (95 Pac. 1, 97 Pac. 541); *State* v. *Ryan,* 56 Or. 524 (108 Pac. 1009). It is claimed by defendant that the court erred in giving the following instructions to the jury:

4. "Larceny is ordinarily defined to be the taking and carrying away of the property of another with intent to convert it to your own use. But the statute of the state has a further definition of larceny. Section 1957 provides: 'If any person shall receive any money whatever for this state, or for any county, town or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such state, county, town or corporation, or in which such state, county, town or corporation is interested, and shall in any way convert to his own use any portion thereof, or shall loan, with or without interest, all or any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded so to do, such person shall be deemed guilty of larceny.' The word 'larceny' as used in this bond means not only its ordinary acceptation of taking and carrying away, what we commonly call stealing, but it also includes the meaning given by this statute."

The instruction correctly states the law of this state as applied to the facts in this case and is approved. The judgment for the principal amount, $7,174.09, is affirmed.

5. The court eliminated from the judgment the amount of interest, $2,606.50, as found by the verdict and plaintiff appeals from that part of the judgment. There are two ways only in which interest may be collectible: (1) By contract to pay interest; and (2) by statutory authority. In the present case the claim is made by virtue of the latter, namely, Section 6028, L. O. L., as it was prior to the amendment by Chapter 358, Laws of 1917. In the case of *Holtz* v. *Olds,* 84 Or. 567, 581 (164 Pac. 583, 1184), the rule in *Baker County* v. *Huntington,* 48 Or. 593, 603 (87 Pac. 1036, 89 Pac. 144), was reaffirmed. This rule has stood too long to be disturbed otherwise than by legislation. The Baker case like the present one was for the enforcement of the collection on an official's bond on account of the defalcation of that officer. The ruling in that case precludes the recovery of interest by plaintiff. The bond in suit is not for a liquidated amount, but provides for a penalty or indemnity. The amount in so far as the liability of the defendant is concerned was not ascertained, fixed or agreed upon in any way until the judgment herein was rendered. Until then as to the defendant the amount due was unliquidated. A *bona fide* contest of the right to recover was made. The bond does not stipulate for the payment of interest. On the contrary it provides for a certain time of payment after proof of loss. For different phases of the question see *Sorenson* v. *Oregon Power Co.,* 47 Or. 24 (82 Pac. 10); *Richardson* v. *Investment Co.,* 66 Or. 353 (133 Pac. 773); *Templeton* v. *Bockler,* 73 Or. 494, 507 (144 Pac. 405); *Schade* v. *Muller,* 75 Or. 225,

233 (146 Pac. 144); *Sargent* v. *American Bk. & Trust Co.*, 80 Or. 16, 39 (154 Pac. 759, 156 Pac. 431); *Carlton Lumber Co.* v. *Lumber Ins. Co.*, 81 Or. 396 (158 Pac. 807, 159 Pac. 969). The judgment as to interest is affirmed.

6. Over the objection of defendant the trial court allowed plaintiff's disbursements incurred upon a previous trial of the case. This is assigned as error. This raises the question as to costs and disbursements upon a former trial of the cause when the verdict was returned in favor of defendant and on motion of plaintiff set aside. It is urged by counsel for defendant that the matter is governed by the rule announced in *Wade* v. *Amalgamated Sugar Co.*, 71 Or. 75, 77 (142 Pac. 350), where Mr. Chief Justice McBRIDE remarked that "there is a dearth of authority on this subject, and plausible arguments may be urged on either side." The common-law rule that "where after a reversal a party again recovered judgment, he could recover only the disbursements of the last trial" was adopted. The basis of this rule is that as the party erroneously obtained the former judgment he is not entitled to disbursements incurred upon such previous trial. In the present case we have the reverse as defendant secured an erroneous decision upon the first trial which was reversed by the trial court and the granting of a new trial was affirmed upon appeal on account of an erroneous charge to the jury. Plaintiff was compelled to have its witnesses in attendance upon such trial; otherwise judgment would have gone against it beyond recall. The prejudicial errors of the first trial were not the fault of plaintiff. The plaintiff having recovered a judgment for $7,174.09, the question now presented under Section 566, L. O. L., which provides that "a party entitled to costs shall also be allowed for all

necessary disbursements'' is: Were the disbursements of plaintiff upon the former trial necessary? The trial court found that they were and such ruling should be upheld.

7, 8. The court denied defendant's objection to the allowance of double mileage at ten cents per mile for witnesses residing and served with a subpoena in Clatsop County who attended by order of the court. Defendant contends that such witnesses are entitled to only ten cents per mile in accordance with Section 3145, L. O. L., which provides:

''Every officer or person whose fees are prescribed in this title who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage at the rate of ten cents per mile in going to and returning from the place where the service is performed; provided, however, that in counties containing more than fifty thousand inhabitants, jurors and witnesses shall be entitled to such mileage at the rate of five cents per mile and no more in so going and returning.''

Counsel for plaintiff contend that witnesses living in a county where ten cents a mile is allowed by statute should be allowed the larger rate for attendance upon court in a county where the lesser rate prevails. While there may be reason to regret the want of uniformity of the enactment it is a legislative question in which various conditions such as transportation facilities and other metropolitan environments are taken into account by the legislative mind. A litigant submitting himself to the jurisdiction of a court in either class of counties is bound by the law applicable to that county. The law applies to all citizens alike and is not inimical to Article I, Section 20, of the Constitution. Plaintiff's witnesses subpoenaed and or-

dered to attend court from outside of Multnomah County should be allowed double mileage at the rate of five cents per mile or ten cents per mile.

The judgment of the lower court as to the taxation of costs will therefore be corrected so as to allow plaintiff for the Clatsop County witnesses ten cents double mileage instead of twenty cents. In all other respects the judgment is affirmed.

AFFIRMED, EXCEPT AS TO COSTS.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued February 14, affirmed March 5, 1918.

CITY OF GRANTS PASS *v.* ROGUE RIVER PUBLIC SERVICE CORP.

(171 Pac. 400.)

Statutes—Repeal—Constitutional Provision.

1. Article IV, Section 20, of the Constitution, declares that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be embraced in the title, but that if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to that subject. Act Feb. 28, 1913 (Laws 1913, p. 689), is entitled, "An act to provide for the organization and incorporation of cities and towns and to legalize such corporations as heretofore have attempted to be incorporated under Chapter 1 of Title XXVI of Lord's Oregon Laws, and are now exercising the functions of incorporated cities and towns under such attempted incorporation." Section 11 of the act expressly repealed Title 26, L. O. L. *Held*, that as the caption of the act of 1913 did not mention the repeal of any existing laws, and did not suggest any attempt to repeal any law or curtail the established privileges of any city or town, the attempted repeal of Title 26, L. O. L., was ineffective, save in so far as a change in procedure for incorporation of municipalities might work an implied repeal, and hence Sections 3211, 3229, giving privileges to municipalities, which were part of Title 26, were not repealed.

[As to the sufficiency of the title of a statute, see note in 64 **Am. St. Rep.** 70.]

Municipal Corporations—Authority of Municipality—Charter.

2. The powers of a municipality are not necessarily restricted to those expressed in its charter, and a municipality may rely on the general statutes applicable to all municipalities enacted prior to the grant of its charter.

Municipal Corporations—Charter—Constitutional Provisions.

3. Those constitutional provisions (Article XI, Section 2) adopted June 4, 1906, forbidding the legislature to enact, amend or repeal any charter or act of incorporation for any municipality or town, do not apply to a municipal corporation already chartered, and which under existing laws was entitled to exercise enumerated privileges.

Damages — Municipal Corporations — Lighting Plants — Bonds — Recovery.

4. A municipal corporation authorized by Sections 3211, 3229, L. O. L., to sue and be sued, contract and be contracted with, acquire, hold, possess, dispose of property, and to provide for the lighting of streets, and furnishing the city or town and the inhabitants thereof with gas or other lights as well as to allow the use of streets and alleys of the city to any person or corporation who may desire to establish works for supplying the city and its inhabitants with water, or lights, upon such reasonable terms as the council may prescribe, granted defendant corporation a franchise to erect poles and string wires in the streets of the town, the ordinance requiring defendant to give a bond conditioned that it should have a certain portion of its service in full operation within nine months after the grant of the franchise and should maintain it so as to furnish electricity adequate for light and power purposes. Defendant accepted the terms of the grant and accepted and executed its bond, but failed to erect poles or in any way to comply with the requirement that it should have a certain percentage of its service in full operation within nine months. *Held*, that the municipality might without proof of any special or actual damages recover the full amount of the undertaking.

From Josephine: FRANK M. CALKINS, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

By an ordinance adopted by its legal voters the City of Grants Pass granted a franchise to the defendant Rogue River Public Service Corporation to plant poles, string wires and do other things necessary for the establishment of an electric plant in that town. The ordinance required that the grantee give a bond to the municipality in the sum of $1,000 conditioned substantially that it should have a certain portion of its service in full operation within nine months after the date of the enactment and afterwards should maintain

it so as to furnish electricity adequate for light and power purposes. The defendant accepted the terms of the grant and executed its bond as required, with the American Surety Company of New York as its surety. Nothing, however, was done by the defendant under the franchise at any time. After the lapse of the nine months' period specified in the bond the city by an ordinance also adopted by the people declared a forfeiture of the undertaking and afterwards brought this action to recover the amount named. Each of the defendants filed a general demurrer to the complaint which being overruled they refused to plead further and judgment followed for the face of the bond and costs. They have appealed. AFFIRMED.

For appellants there was a brief over the names of *Mr. F. C. Howell* and *Mr. O. S. Blanchard,* with an oral argument by *Mr. Howell.*

For respondent there was a brief and an oral argument by *Mr. H. D. Norton.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The plaintiff city operates under a charter enacted by the legislative assembly of the state in the form of an act approved February 16, 1901. In the present juncture it relies for sanction of its action not only upon that enactment, but also upon the general statute of 1893 embodied in Title XXVI, L. O. L., Chapters 1–5 inclusive. Section 3211, L. O. L., reads thus:

"Municipal corporations now existing in this state, or hereafter organized therein under this act, shall be bodies politic and corporate, under the name of the city or town, as the case may be, of ——, and as such may sue and be sued, contract and be contracted with, acquire, hold, possess, dispose of property subject to the re-

strictions contained in this act or other laws of this state, have a common seal, and change or alter same at pleasure, and exercise such other powers and have such other privileges as are now conferred by law, or by this act, or which may hereafter be conferred by laws duly enacted by the legislative assembly of this state, and shall have perpetual succession."

It is said also in Section 3229, L. O. L.:

"The mayor and aldermen shall compose the common council of any such city or town organized under this act, and at any regular meeting thereof shall have power to provide for lighting the streets, and furnishing such city or town and inhabitants thereof with gas or other lights, and with pure and wholesome water; and for such purposes may construct such water, gas or other works, within or without the city limits as may be necessary or convenient therefor, and may allow the use of the streets and alleys of the city to any person, company, or corporation who may desire to establish works for supplying the city and inhabitants thereof with such water or lights upon such reasonable terms and conditions as the council may prescribe."

By the terms of the legislation of 1893, noted above, the privileges accorded by the latter section inured not only to municipalities created under the act itself, but also to all others of the kind then existing. We are not unmindful of the act of February 28, 1913, Laws of 1913, p. 689, the title of which reads thus:

"An Act to provide for the organization and incorporation of cities and towns and to legalize such corporations as heretofore have attempted to be incorporated under Chapter I of Title XXVI of Lord's Oregon Laws, and are now exercising the functions of incorporated cities and towns under such attempted incorporation."

Section 11 thereof declares:

"Chapter 1 of Title XXVI of Lord's Oregon Laws and all acts and parts of acts in conflict therewith are hereby repealed."

We here set down Article IV, Section 20, of the Constitution of the state:

"Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be embraced in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

In the title of the act in question there is no hint whatever of any intention to repeal any law or to curtail the established privileges of any city or town. The right to contract and to prescribe the terms thereof was vested by that statute in all municipal corporations and no one reading the title in question could divine that the legislative body intended to cancel those rights. The principal features of the law appearing in the body thereof relate to the manner in which the creation of a new city or town may be initiated; and, so far as it actually and necessarily supersedes the former procedure, it would probably amount to a repeal by implication; but only so because we are advised by the title of the probable scope of the act, and not, however, of any proposed avulsion of long-settled rights. We hold, therefore, that as against the grant of the privileges mentioned the repealing words in Section 11 are void under the constitutional provision already noted because the subject of such repeal is not named in the title.

2. The defendants urge that the act of 1893 is not available to the plaintiff corporation, that it can operate solely by its charter, and that unless in this latter instrument it has express authority to exact a bond the attempt to do so is void and creates no liability upon the defendants although they disregarded the covenant thereof. It is true that by the strict letter of some

utterances of the court in cases heretofore under consideration color is given to such a contention for it is often said that a corporation is bound by its charter and cannot exceed the terms thereof. Without exception, however, in those cases a charter was confessedly the only source of corporate power then under judicial consideration. In our judgment it is not necessary that all the authority of any municipality shall be found in some one enactment of the legislative department of the state. That branch of the government is not restricted within such narrow terms as to require it to express all its will upon any subject in a single statute.

3. Neither is the question before us within the scope or prohibition of the later constitutional provisions forbidding the legislative assembly to enact, amend or repeal any charter or act of incorporation for any municipality, city or town. This constitutional measure was not adopted until June 4, 1906, while the privileges conferred by the actual charter of Grants Pass and by the act of 1893 were all promulgated long before. At that time at least it was not necessary that such a subject be treated as if the state should tender to a municipality a certain privilege which the latter could accept or reject as if it were a high contracting party. Then municipalities of the kind were under the sole control of the legislative department. The latter could award or withhold privileges, and without further ado the town could operate under the franchises thus conferred.

4. The resulting legislative situation is substantially like that portrayed in and governed by the case of the *City of Salem* v. *Anson,* 40 Or. 339 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169). In that instance Anson had procured a franchise from the city allow-

ing him the use of the streets and alleys for the purpose of establishing an electric light plant. The town exacted from him a bond almost precisely like the one in question in its general provisions. This court sustained the city in recovering the full amount of the undertaking, without being compelled to show that it had suffered any special or actual damages whatever. That case rules the present one. On its authority we affirm the judgment of the Circuit Court.

Affirmed.

Mr. Chief Justice McBride, Mr. Justice Benson and Mr. Justice Harris concur.

Argued February 14, affirmed March 5, 1918.

In Re GRANTS PASS. IRR. DIST.

(000 Pac. 000.)

Waters and Watercourses—Irrigation Districts—Organization—Bond Issue—Approval of Court—Statutes.

1. Under Title XLI, Chapter VII, L. O. L., as amended by legislative acts, providing for the organization of irrigation districts, the issuing and sale of bonds of said district, and by authority of Chapter 357, page 773, Section 41, Laws 1917, allowing special proceedings in the Circuit Court of the county in which the office of such district is located, for the purpose of having a judicial examination and judgment of the court as to the regularity and legality of the proceedings of the board of directors of said district providing for and authorizing the issue and sale of bonds of said district, record examined and *held*, that the organization and existence of said irrigation district and the validity of the bonds it proposes to issue are regular in all respects and is therefore approved.

From Josephine: Frank M. Calkins, Judge.

Proceedings instituted by the directors of the Grants Pass Irrigation District to obtain from the court an order declaring valid and legal all the steps leading up to the organization of the district and the election

held as to the issuance and sale of bonds of the district. One of the land owners affected by the organization of the district filed a general demurrer, which, being overruled, declined to further plead; the court entered a decree approving both the organization of the district and the bond issue, from which decree the demurrant appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Edward S. Van Dyke.*

For respondent there was a brief and an oral argument by *Mr. H. D. Norton.*

Department 1. Opinion PER CURIAM.

1. Acting under the provisions of Chapter VII of Title XLI, L. O. L., and acts of the legislative assembly amendatory thereof the requisite number of freeholders petitioned the County Court of Josephine County to call an election to determine whether there should be established an irrigation district covering land mostly in that county but to a much less extent in the adjoining county of Jackson. Such proceedings were taken that an election was held in consequence of which the County Court on January 29, 1917, entered of record its order of that date declaring the result of the election to be in favor of the establishment of the district under the name, Grants Pass Irrigation District, and choosing certain named individuals directors and treasurer respectively. The order also proclaimed that the district is duly formed and in operation.

On September 4, 1917, in pursuance of a resolution unanimously adopted by it on that date all the directors being present the board of directors ordered an election to be held on October 4, 1917, in the district to de-

termine whether its bonds should be issued and sold in the sum of $290,000 par value, or so much thereof as may be necessary to install suitable irrigation works. The election was held on the day designated. The board canvassed the returns and declared the result to be in favor of the issuance and sale of bonds as the question was submitted to the electors.

On October 17, 1917, the directors instituted this proceeding to procure for the organization of the district and the issue of bonds the approval of the court. Such a step is authorized by Chapter 357, Section 41, of the Laws of 1917. That enactment in common with all preceding statutes on that subject, lays down this rule of construction for the guidance of the judiciary:

"The court hearing any of the contests provided for by this act, or any inquiry into the legality or correctness of any of the proceedings herein provided for, must disregard any error, irregularity, informality or omission which does not injuriously affect the substantial rights of the parties to said proceeding."

A general demurrer to the petition of October 17, 1917, was interposed by one of the landholders affected by the organization of the district and the transactions in pursuance thereof, to which allusion has been made, but it was overruled and, as he declined to plead further, the Circuit Court entered its decree approving the organization of the district and the bond issue. The demurrant appealed.

The briefs filed indicate that the proceeding is amicable and designed mainly to secure the judicial visé as imparting greater sanction to the bonds with the possible result of making them more salable. Notwithstanding this, we have given careful scrutiny to the history of the organization of the district and its action culminating in the authorization of the bond issue as portrayed in the very full record before us

and find it to be singularly free from error especially when measured by the statutory canon above quoted.

The decree of the Circuit Court will therefore be affirmed by one here entered also declaring regular in all respects the organization and existence of the district and the validity of the bonds it proposes to issue.

AFFIRMED.

Argued January 25, reversed February 13, rehearing denied March 12, 1918.

DITCHBURN *v.* CAPLES.*

(170 Pac. 728.)

Appeal and Error—Review—Findings.

1. Findings of fact by the trial court in a case tried without a jury are conclusive in so far as they are supported by evidence.

[As to weight in appellate court of finding of judge as to amount of damages, as compared with verdict of jury, see note in Ann. Cas. 1913C, 178.]

Bills and Notes—Consideration—Defenses.

2. In an action on notes given for the purchase price of personal property, it is no defense to show that plaintiff did not own some of the property which he represented was included in the purchase, unless the value of such property be shown, the fact that the assets secured by the purchasers were less than the amount which they paid entitling them to no relief, as they might have made an improvident bargain.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Action by John Ditchburn against R. E. Caples and A. B. Caples to recover an alleged balance due on a promissory note. Trial to the court and from a judgment rendered in favor of defendants, plaintiff appealed. Reversed and remanded for a new trial.

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*On failure of consideration as a defense to action on a purchase price note, see note in 39 L. R. A. (N. S.) 938. REPORTER.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action brought to recover a balance of $150 still unpaid on a note for $400 given by defendants to plaintiff. Defendants admit the execution of the note, but allege fraud and failure of consideration.

The answer avers that the note was executed as a part of the purchase price of a woodyard sold by plaintiff to defendants; that plaintiff represented that the purchase covered some wagons and other personal property which in fact plaintiff did not own; that the representations so made were willfully false and that defendants relied upon them in making their purchase. The price agreed upon was $1,000 and the defendants paid $850 of this amount before this action was brought; $250 of this money was paid by defendants on the note sued on.

The reply denies the affirmative allegations of the answer.

The case was tried by the court without a jury. The findings and judgment were for defendants and plaintiff appeals.

REVERSED AND REMANDED FOR NEW TRIAL.

For appellant there was a brief over the names of *Mr. John Ditchburn* and *Messrs. Mack & Fryer,* with an oral argument by *Mr. Ditchburn, in pro. per.*

For respondents there was a brief over the name of *Messrs. Jenkins & Crawford,* with an oral argument by *Mr. B. B. Crawford.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. The evidence in this case is conflicting. We are bound by the findings of the Circuit Court in so far as

they are supported by any evidence. The court found that plaintiff sold to the defendants ten or twelve wagons, an electric motor, a wood-saw, a conveyor and other personal property which he did not own; that plaintiff's representations that he owned these articles were false and that defendants purchased in reliance on them; also that the personal property so sold to defendants was taken from them by the true owner. In all of these respects the findings are supported by evidence.

2. These findings, however, are insufficient to support a judgment for defendants. If defendants are to recoup against plaintiff their damages arising from plaintiff's failure of title to the wagons and other articles, it is necessary for them to prove the value of this personal property which they lost: *Hornsby* v. *Butts,* 85 Ga. 694 (11 S. E. 846); *Otis* v. *Holmes,* 109 Ga. 775, 777 (35 S. E. 119); *Clegg-Ray Co.* v. *Indiana Scale and Truck Co.,* 125 Ga. 558 (54 S. E. 538); *Krauss* v. *Flournoy,* 7 Ga. App. 322 (66 S. E. 805); *Willis* v. *Bullitt,* 22 Tex. 330; *Baldwin* v. *Banks,* 20 Ill. 48, 51 (71 Am. Dec. 249); *Honeyman* v. *Jarvis,* 64 Ill. 366, 368; *Farris* v. *Alfred,* 171 Ill. App. 172. No such testimony is found in the record and there is no evidence, therefore, to support the court's finding that "there was no consideration for said promissory note."

It satisfactorily appears that the assets which defendants secured were worth less than the amount which they paid plaintiff, but this evidence does not entitle them to relief. They may have made an improvident bargain.

The judgment is reversed and a new trial is ordered.

REVERSED AND REMANDED. REHEARING DENIED.

MR. JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE BENSON concur.

Affirmed October 16, 1917, rehearing denied March 12, 1918.

STATE v. AUSPLUND.*

(171 Pac. 395.)

From Multnomah: JOHN P. KAVANAUGH, Judge.

On petition for rehearing. Denied.

Messrs. Logan & Smith and *Mr. John J. Fitzgerald,* for the petition.

Mr. C. C. Hindman, Deputy District Attorney, for the State.

Department 1. MR. JUSTICE BENSON delivered the opinion of the court.

Counsel for defendant has presented an exceedingly vigorous argument for a rehearing based upon the contention that affidavits of jurors offered for the purpose of impeaching their verdict ought to be considered by the court upon a motion for a new trial. However, nothing is said therein that has not had very serious consideration of this court upon several occasions and yet we have not been able to arrive at a conclusion which would reverse the doctrine announced in *Cline* v. *Broy,* 1 Or. 89, and consistently followed ever since. Nothing can be added at this time to the original opinion herein, to which we adhere. The petition is denied. AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

*For former opinion, see 86 Or. 121 (167 Pac. 1019).

Argued February 26, appeal dismissed March 12, 1918.

THOMAS *v.* THRUSTON.

(171 Pac. 404.)

Appeal and Error—Grantees in Deed—Presumption.

1. Where sheriff's return upon order to bring in new parties showed that E. had succeeded to rights of M., it will be presumed that E.'s wife, who joined him in demurring to complaint, and who is named as a proper party in assignments of error, is one of grantees in deed executed by M.

Waters and Watercourses—Use of Water for Irrigation—Rights—Determination.

2. In suit to establish relative rights to use of water for irrigation, whether a party's interest wholly coincides with that of plaintiffs or defendants is not very important, since a decree applicable to rights of each should be rendered where justified by pleadings and evidence.

Appeal and Error—Notice of Appeal—Adverse Parties.

3. As those brought in by due service of court's order and whose demurrers to complaint were sustained were adverse parties as to defendant, whose motion to amend his answer so as to make demurrants defendants in the suit was denied, the Supreme Court acquired no jurisdiction of defendant's appeal from decree after trial where no notice of appeal was served on demurrants in view of Section 41, L. O. L., providing that when a complete determination of a controversy cannot be had without the presence of other parties, the court shall cause them to be brought in, and Section 558, providing that the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment or decree appealed from.

From Lake: ROBERT G. MORROW, Judge.

Suit by L. G. Thomas, Lewis E. McCulley and Elmer M. McCulley against E. C. Thruston relative to the use of waters of Cogswell Creek. From the decree rendered the defendant attempts to appeal, but no notice of appeal was served on the new parties brought in on motion. The facts are set forth in the opinion of the court. APPEAL DISMISSED.

For appellant there was a brief over the names of *Mr. Alfred E. Reames,* in Supreme Court only, and *Mr. L. F. Conn,* with an oral argument by *Mr. Reames.*

For respondent there was a brief and an oral argument by *Mr. W. Lair Thompson.*

Department 1. OPINION PER CURIAM.

This suit was begun July 22, 1908, to restrain the destruction of a dam built in Cogswell Creek, Lake County, Oregon, at the head of an irrigating ditch which diverted from that stream water and conducted it to the plaintiff's lands where it was used for raising crops. An amended complaint was filed October 22, 1908, and an answer was put in April 5, 1909, when the defendant filed his affidavit, showing that designated persons were asserting rights to the use of water from that creek. The defendant's counsel thereupon moved that the persons so indicated be brought in and made parties, as plaintiffs or defendants. A reply was filed May 10, 1909, when the plaintiff L. G. Thomas submitted a counter-affidavit opposing the making of the persons named as parties. Two days thereafter the defendant filed a supplemental and amended affidavit, indicating the interest of the designated persons in the subject matter of the suit. An order was made by the court December 27, 1910, requiring that there should be brought in and made parties, as plaintiffs or defendants, Anna McGrath, George Barrington, Wm. Barrington, Eliza McCready and D. E. Henderson, or the grantee or successor in interest of either, and that a copy of the order, certified by the clerk, should be served by the sheriff upon the persons so named, who were commanded to appear and plead on or before March 1, 1911. The return of that officer shows that he served a duly certified copy of the order upon H. Vernon and Ed Hartzog, the successors in interest of Anna McGrath; that he also delivered a like copy thereof to all the other persons named therein, except

Eliza McCready who, after diligent search and inquiry, he was unable to find in the State of Oregon, and that he further served a copy of the order on all the original parties to this suit, except the plaintiff Lewis E. McCulley, whom he was unable to find in the state but learned he was absent therefrom. D. E. Henderson on April 3, 1911, filed a disclaimer showing he had never asserted a right to or interest in the use of any of the water in Cogswell Creek. On the 10th of that month Eliza McCready, formerly Eliza Barrington, George Barrington and W. J. Moore, as guardian of the estate of Wm. Barrington, a minor, demurred to the amended complaint, on the ground that it did not state facts sufficient to constitute a cause of suit against either of them. At the same time Hurley Vernon, Elma E. Hartzog and Ed Hartzog, her husband, as the successors in interest of Anna McGrath, also demurred to that pleading for the same reason. Pursuant to a declaration made by the court that all subsequent matters relating to the suit should be submitted to the judge of another Circuit Court, a stipulation was entered into August 29, 1911, by the plaintiffs' attorney and counsel for the parties who had demurred to the amended complaint, that these demurrers should be considered upon briefs by the judge of the Circuit Court for Jackson County at chambers, who was thereby authorized to determine the same and make the necessary orders thereat, whereupon all the papers including written arguments were sent to that judge who, after due examination, made an order sustaining the demurrers. The defendant's counsel on January 10, 1913, served upon all the interested parties a motion for leave to file an amended answer, and asked that his pleading be altered so as to make the parties who had demurred to the amended complaint defendants in the suit. This motion by agree-

ment of the parties was transmitted to the judge of the Circuit Court for Jackson County who, on July 8, 1913, denied the application. Thereafter the cause was tried resulting in a decree from which the defendant undertook to appeal by serving a notice thereof upon the original plaintiffs and their attorney and by giving the required undertaking. The plaintiffs' counsel moved to dismiss the appeal because the notice was not served upon Eliza McCready, George Barrington, Wm. Barrington, W. J. Moore as guardian of the latter, Anna McGrath or Hurley Vernon, Elma E. Hartzog and Ed Hartzog, as successors in interest of Anna McGrath, or D. E. Henderson, or upon either thereof, or upon his or their attorney. This motion was temporarily denied by this court with leave, however, to renew the application at the argument of the cause on the merits, when it was again insisted by plaintiffs' counsel that by reason of the failure thus to serve the notice of appeal upon the persons last named, no jurisdiction of the cause was obtained.

The question to be considered is whether or not the interest of such persons, in relation to the decree which has been brought up for review is in conflict with a modification or a reversal thereof: *The Victorian,* 24 Or. 121 (32 Pac. 1040, 41 Am. St. Rep. 838). See, also, *Van Zandt* v. *Parson,* 81 Or. 453 (159 Pac. 1153), where other like discussions upon this subject are collated. One of the errors assigned in the abstract of the defendant's counsel reads in part:

"That the court erred in denying appellant's motion * * for permission to file an amended answer, setting up appellant's rights as against the new parties, Elma E. Hartzog, Ed Hartzog, Hurley Vernon, George Barrington, William Barrington and Eliza McCready, for the reason that said parties, and each of them, were necessary parties to the adjudication, and without

whose presence the rights of the respective parties, to the waters of said stream, could not be adjudicated."

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court will cause them to be brought in": Section 41, L. O. L.

1. The defendant's affidavits in support of his motion to bring in other parties describes the real property owned by Anna McGrath, and states that at the commencement of this suit and for four years prior thereto, she and her grantors were using and claiming a right to appropriate a part of the waters of Cogswell Creek to the irrigation of her land, giving the point of diversion as located above the head of the ditch owned by the plaintiffs and the defendant. The return of the sheriff indorsed upon the order to bring in new parties, shows that H. Vernon and Ed Hartzog had succeeded to the rights of Anna McGrath. As Elma E. Hartzog joined her husband Ed Hartzog in demurring to the amended complaint, and as she is also named in the assignment of errors as a proper party, it must be assumed she is one of the grantees named in a deed executed by Anna McGrath or that she succeeded to her interest wholly or in part to the land.

The defendant's affidavit also states that George and William Barrington, who are minors, and Elizabeth McCready own specified parcels of real property, and for more than three years they have been and are using under a claim of right, a part of the waters of the creek in irrigating their lands, by an extension of the Anna McGrath ditch.

The affidavit further shows that D. E. Henderson is the owner of particularly described land and at the

commencement of this suit he was diverting, from a tributary of Cogswell Creek, water and using it under an assertion of right in irrigating his premises by means of a ditch dug further up the stream than the ditches of the plaintiffs and of the defendant.

In *Hough* v. *Porter,* 51 Or. 318 (95 Pac. 732, 98 Pac. 1083, 102 Pac. 728), which was a suit to determine the right to the use of flowing water for irrigation purposes, it was held that under Section 41, L. O. L., the court properly exercised its discretion and was authorized to make an order requiring all interested parties to submit their claims for adjudication.

In *Williams* v. *Pacific Surety Co.,* 66 Or. 151, 155 (127 Pac. 145, 131 Pac. 1021, 132 Pac. 959, 133 Pac. 1186), it was ruled that while at common law only one judgment could be given in favor of all plaintiffs or defendants, the court, under Section 41, L. O. L., might give judgment for or against one or more of several defendants, or for or against one or more plaintiffs, as justice might require, and determine the ultimate rights of the parties between themselves.

2. In a suit to establish relative rights to the use of water for irrigation, while there may be a community of interest between the plaintiffs or the defendants, adverse claims may possibly arise between parties of the same class in which case each becomes an Ishmael, for "his hand will be against every man, and every man's hand against him." In such a suit whether a party's interests wholly coincides with that of the plaintiffs or the defendants is not so very important, since a decree applicable to the rights of each to the use of water for the purpose specified should be made when it is justified by the averments of the pleadings and substantiated by the evidence, even if the final deter-

mination be prejudicial to one or more parties of the same class.

It will be borne in mind that one of the plaintiffs filed an affidavit against the making of an order to bring in new parties. In view of this hostility it is not reasonable to suppose that in the absence of a command by the court to that effect, the complaint would have been amended so as to charge the parties, who were ordered to be brought in with any infringement of the plaintiffs' right to the use of water for irrigation. No alteration having been made in this respect in the plaintiffs' primary pleading, the demurrers interposed thereto by the new parties were necessarily sustained. This action did not leave the defendant remediless and his counsel taking advantage of the situation moved for leave to amend the answer so as to charge the parties who had been brought in with the use of water to his prejudice from the creek for irrigation, which motion was denied. If the notice of appeal had been served upon the new parties, it would have been necessary in reviewing the decree, if the alleged error had been assigned, to consider the action of the court in denying the motion, and if it were found that discretion had been abused in this particular, a reversal of the decree would have been inevitable, and the cause could have been remanded to correct the error, for an appeal brings up all intermediate orders that have been made preceding the final disposition of the cause: Section 558, L. O. L.

3. Pursuant to due service of the court's order, the parties who were thus brought in, except D. E. Henderson, demurred to the amended complaint, thereby appearing in the suit. In sustaining the demurrers, the parties who interposed them remain as such until the decree rendered herein passes beyond the possibility

of a reversal or modification. It is safe to predict that the parties ordered to be brought in opposed a judicial investigation of their alleged rights to the use of the waters of Cogswell Creek. If the notice of appeal had been served upon them and the action of the court in refusing to permit the defendant to amend his answer so as to charge them with interfering with his right to the use of the water of that stream had been set aside, the interests of the new parties in relation to the final determination would necessarily have been in conflict with a modification or reversal sought by the appeal, and hence they are adverse parties, a failure to serve whom with the notice of the appeal, did not confer upon this court jurisdiction of the cause, and for that reason the appeal is dismissed.

APPEAL DISMISSED.

Submitted on briefs February 26, affirmed March 12, 1918.

COOPER v. FOX.

(171 Pac. 408.)

Municipal Corporations—County Roads—Jurisdiction of County Court—Exclusion of Interference by City—Statutes.

1. Under Laws of 1917, page 588, Section 2, and page 613, Sections 2, 5, 7, 10 and 24, relating to county roads, control thereof, and taxation therefor, a County Court has exclusive jurisdiction over all county roads within the county, necessarily excluding the right of every municipal corporation through whose limits such highways extend from interfering therewith, and neither a city nor its officers can superintend the outlay of any money raised by municipal taxation for maintenance of streets, etc., in improving a county road within its borders.

[As to right of public officer or board to delegate power of approval, see note in Ann. Cas. 1912B, 500.]

Highways—Delegation of Power to Improve—Limitation of Exercise to County Officers—Statute.

2. The delegation of power to the County Court, by Laws of 1917, page 588, Section 2, to improve a county road, limits its exercise to the specified authority, thereby excluding the councilmen of a city or any other officer or person, except as assistant to a member of the County Court or other county officer.

From Clackamas: GEORGE R. BAGLEY, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This suit was instituted September 17, 1917, by Julia Cooper, against the City of Oswego, a municipal corporation, and its executive officers and a contractor, to enjoin a threatened outlay of money raised by direct taxation, in improving an alleged county road within the corporate limits of the city. From a decree granting the relief prayed for in the complaint, the defendants appeal. AFFIRMED.

For appellants there was a brief submitted by *Mr. Joseph E. Hedges.*

For respondent there was a brief over the name of *Mr. William M. Stone.*

MR. JUSTICE MOORE delivered the opinion of the court.

The evidence received at the trial supports the findings of fact made by the court to the effect that by an exercise of initiative power, the City of Oswego was incorporated January 15, 1910; that about 40 years prior thereto a county road, extending from Oregon City northerly, was laid out and established across land now included within that city, which part of the highway in such municipality, though there designated as Front Street, always has since it was laid out been used by the public and is subject to the jurisdiction and control of the County Court of Clackamas County; that the plaintiff is a taxpayer of the City of Oswego and the defendants, aside from the municipality, are the mayor and councilmen thereof respectively, and a contractor; that for the past four years there has been levied on all assessable property in that city, pursuant to the provisions of its charter, an annual tax of ten mills on the

dollar, a part of which exaction has been set aside for the maintenance and repair of streets and sidewalks; that there is now on hand for such purpose $4,915 of which sum about $900 was received by the city from the County Court of that county, as the share due the municipality of the public road fund; that on August 10, 1917, an ordinance was enacted and approved, providing for the improvement of Front Street according to plans and specifications thereof, and the payment of a part of the costs thus to be incurred from the fund so raised by taxation; and that pursuant to such legislation the defendant contractor proposed to do the required work for $2,756.90, and such executive officers accepted the bid and threatened to enter into a contract with him for such improvement. As a conclusion of law the court also found that no part of the sum of money so raised by levy of the municipal tax, could legally be used in improving Front Street, which highway was a county road and not a city street.

It satisfactorily appears that no part of the county road within the City of Oswego, and there known as Front Street, was ever vacated, or jurisdiction thereof abandoned by the County Court of Clackamas County. If the expense to be incurred by improving that part of the highway within the city had been attempted to be liquidated by a fund to be raised by a special assessment of the real property abutting upon the county road, for the benefit supposed to be conferred, the proceedings would have been wholly futile: *Cole* v. *Seaside,* 80 Or. 73 (156 Pac. 569); *Christie* v. *Bandon,* 82 Or. 481 (162 Pac. 248).

Excerpts from statutes which are deemed to be involved herein will be set forth.

"All county roads shall be under the supervision of the County Court wherein said road is located. Each County Court within this state shall have the authority,

and it shall be its duty to supervise, control and direct the * * maintenance and keeping in repair, improvement and vacation of all county roads within its county, and to prescribe the methods and manner of working, improving and repairing the same. * * The powers herein given may be exercised directly by the court, or through some one of its members designated for that purpose, with the aid of necessary assistants": Gen. Laws Or. 1917, Chap. 295, § 2.

"On and after January 1, 1918, the offices of road supervisor and roadmaster, as fixed and defined by law prior to the taking effect of this Act, shall be and are hereby abolished: Gen. Laws Or. 1917, Chap. 299, § 2.

"The County Court shall employ such deputy roadmasters, patrolmen and assistants as may in its judgment be necessary to enable the roadmaster to perform his duties expeditiously and economically": Id., § 5.

"It shall be the duty of the county roadmaster and his deputies and assistants * * to superintend all work done upon the roads and bridges within the county, whether done under contract or otherwise. * * To discharge and perform all duties that are imposed upon road supervisors by any law of this state": Id., § 7.

"Each County Court at the September term thereof, shall so arrange the road districts of the county as to conform to the provisions of this section * * ; *provided,* that all road districts formed under the provisions of this Act shall be formed from contiguous territory; *provided, further,* that every incorporated city and town shall constitute a separate road district. * * : Id., § 10.

"The County Court may levy a tax not to exceed ten mills on the dollar on all taxable property of such county, at the time of making the annual tax levy, which shall be set apart in the county treasury as a general road fund. * * Said tax shall be paid in money, and levied and collected in the same manner as other county taxes are levied and collected, and when so collected shall be used for road purposes only, as provided in this Act, and seventy per cent thereof shall be apportioned to the several road districts, including districts composed of incorporated cities and towns": Id., § 24.

As these statutes contained no emergency clauses they went into effect 90 days after February 19, 1917, when the legislature adjourned, or May 20, 1917: Article IV, Section 28, of the Constitution.

1. From these selections it will be seen that the County Court has exclusive jurisdiction over all county roads within the county, thereby necessarily excluding the right of every municipal corporation, through whose limits such highways may extend, from interfering therewith. The City of Oswego cannot, as an independent agency of the state, nor can any of its officers, superintend the outlay of any money raised by taxation in improving a county road within its borders.

2. The prayer of the complaint herein does not ask that the defendants be enjoined from expending any part of the $900 received from Clackamas County in repairing the highway known as Front Street in the City of Oswego, and the decree rendered conforms to such request. The right of any officer of the municipality, unless specially appointed by the County Court to assist it or one of its members or other officer of the court, to superintend the outlay of any part of the money so received from the county, may well be doubted. It will be remembered that the authority to improve a county road is vested in the County Court, which power may be exercised by that tribunal, or by one of its members designated for that purpose with the aid of necessary assistance: Gen. Laws Or. 1917, Chap. 295, § 2. This delegation of power necessarily limits its exercise to the authority specified, thereby excluding the councilmen of a city or any other officer or person, except as an assistant to a member of the County Court or other county officer. That part of the decree, however, will not be disturbed, for it is quite probable that since the outlay of the money, which was received from

the county, was not enjoined, the $900 may have been expended by or under the direction of a city officer.

It is not necessary to inquire whether or not a municipal corporation can legally appropriate money which has been raised by direct taxation to aid in repairing a county road within its corporate limits, when the County Court or some member thereof, or other county officer, superintends the improvement, for that question is not before us.

As the highway undertaken to be improved herein is a county road which has never been vacated by the County Court, upon condition that the street was to be kept open and in repair for public use by the municipality, the decree should be affirmed and it is so ordered. AFFIRMED.

Submitted on briefs March 4, affirmed March 12, 1918.

SPENCER v. SMALL.

(171 Pac. 409.)

Justices of the Peace—Proof of Service—Sufficiency.

1. Where the sheriff's return on summons did not state that copy of complaint served with summons was certified to be correct by plaintiff, his agent or attorney or the justice, the service was insufficient to warrant a judgment by default, in view of Section 2420, L. O. L., providing that the summons shall be served by delivering a copy thereof, together with a copy of the complaint certified to be correct by plaintiff, his agent or attorney or the justice.

[As to conclusiveness of sheriff's return of service of summons and remedy of persons injured thereby, see note in 124 Am. St. Rep. 756.]

From Tillamook: GEORGE R. BAGLEY, Judge.

In Banc. Statement by MR. JUSTICE MCCAMANT.

This is an action brought for the conversion of an automobile. The defendants justify under an execution sale on a judgment which they allege was recov-

ered by the defendants Small and Urie against the plaintiff Spencer in a Justice's Court in Tillamook County. Plaintiffs deny that any such judgment was rendered. The defendant Burke was a deputy sheriff who is alleged to have conducted the execution sale. It appears that an action was brought against the plaintiff Spencer as alleged and a default judgment was rendered against him. The real dispute has to do with the service of the summons, plaintiffs contending that the record fails to show any service sufficient to support the judgment as against a collateral attack.

Plaintiffs had judgment in the instant case and defendants appeal. AFFIRMED.

For appellants there was a brief submitted over the name of *Mr. E. J. Claussen.*

For respondents there was a brief prepared and submitted by *Mr. George P. Winslow.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. The only error assigned is the exclusion by the court of the summons and the return thereon in the case of Small and Urie against Spencer. The return was as follows:

"State of Oregon,
County of Tillamook,—ss.

"I hereby certify that I served the within Summons within said State and County on the 23d day of December, 1915, on the within named defendant H. B. Spencer, by delivering a copy thereof prepared and certified to by me as deputy Sheriff, together with a copy of the complaint prepared and certified to by —— to —— personally and in person.

"H. CRENSHAW,
"By J. L. BURKE, Deputy."

Section 2420, L. O. L., is as follows:

"The summons shall be served by delivering a copy thereof, together with a copy of the complaint, certified to be correct by the plaintiff, his agent or attorney or the justice, to the defendant in the manner provided for in the Code of Civil Procedure for the service of summons in actions in courts of record. The summons shall be returned to the justice by whom it was issued by the officer serving it, with the proof of such service, or that the defendant cannot be found."

In holding this return insufficient to support a judgment, the Circuit Court followed *Belfils* v. *Flint,* 15 Or. 158, 161 (14 Pac. 295). In this case Mr. Chief Justice LORD said:

"The return on the summons does not show that a copy of the complaint certified by the justice of the peace before whom the cause was pending, or certified to by the plaintiff, his agent or attorney, was served on the defendant. This is a statutory requirement which must be observed before jurisdiction can be assumed or conferred. Whether it has been complied with or not, we must look to the return of the officer upon whom is imposed this duty. As the return of that officer does not show that a copy of the complaint, certified as required, was served, the service is insufficient to warrant a judgment by default against the defendant."

The statute in force at the time the above case was decided provided that in actions in courts of record service should be made as follows:

"The summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the county clerk": Deady and Lane Code, p. 115, § 54.

The above provision was made applicable to actions in Justice's Courts by Section 7 of the statute govern-

ing procedure in these courts, found on page 463 of the Code. It will be noted that the statute under which *Belfils* v. *Flint* was decided is substantially identical with Section 2420, L. O. L.

Belfils v. *Flint* has never been overruled. It is cited with approval in *Lane* v. *Ball*, 83 Or. 404, 415 (160 Pac. 144, 163 Pac. 975). In the case at bar the return fails to show the service on Spencer of a copy of the complaint certified to be correct by the plaintiff, his agent or attorney or by the justice of the peace. This case is therefore not to be distinguished from *Belfils* v. *Flint*.

Defendants cite *Moore Realty Co.* v. *Carr*, 61 Or. 34, 39 (120 Pac. 742), and *Stadelman* v. *Miner*, 83 Or. 348 (155 Pac. 708; 163 Pac. 585, 983). These cases are instructive as to the principles which should be applied when a judicial record is collaterally attacked, but neither of them involved the sufficiency of a sheriff's return on a summons. These authorities do not modify the rule announced in *Belfils* v. *Flint*.

It follows that the judgment should be affirmed, and it is so ordered. AFFIRMED.

Argued February 20, affirmed March 12, 1918.

BELCHER *v.* LA GRANDE NAT. BANK.

(171 Pac. 410.)

Deeds—Delivery—Right to Question.

1. A judgment creditor of one of two grantors could only question the delivery of the conveyance so far as it involved the interest of his debtor.

Deeds—Sufficiency of Delivery—Delivery to Agent of Grantee.

2. Where a deed by S. and B. was delivered to B., as the agent of the grantee, there was a sufficient delivery so far as the interest of S. was concerned.

Judgment—Priority of Lien—Unrecorded Conveyance.

3. Under Section 207, L. O. L., providing that a conveyance of real property shall be void as against the lien of a judgment, unless recorded at the time of docketing the judgment, or unless recorded within the time after its execution provided by law, a judgment lien, in order to have precedence over a prior unrecorded deed, must have been taken or acquired in good faith, without notice or knowledge of the unrecorded conveyance.

Judgment—Priority of Lien—Unrecorded Conveyance.

4. Where owners of land, who had contracted to sell it, conveyed the land and assigned the contracts to the grantee, but the deed was not recorded, the possession of the land by the executory purchasers was such possession by strangers to the legal title as charged a judgment creditor with notice of the grantee's rights, though the premises were in possession of the same persons before and after the conveyance.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2. Statement by MR. JUSTICE BENSON.

This is a suit to remove a cloud from the title to real estate. The history of the transactions involved is about as follows: W. F. Stine and F. S. Belcher were the joint owners of two pieces of residence property in the City of Portland. On March 30, 1909, they executed a contract of sale of one tract to John F. Beaumont and wife, providing for monthly payments upon the purchase price, and a covenant to convey upon payment of a stipulated sum, and the purchasers entered into immediate occupation of the premises. On July 16, 1909, they entered into a similar contract for the sale of the other lot of land to Genevieve Chapman Sweet, who entered into immediate occupation of the premises. On November 1, 1909, they executed a deed conveying both tracts, subject to the above contracts and certain mortgages, to plaintiff, who is the mother of F. S. Belcher and the aunt of Mrs. Stine. On the same day that the deed to plaintiff was executed the two contracts of sale above mentioned were also assigned to her by written indorsement thereon, which indorsement was made upon the duplicates held by the purchasers.

The conveyance to plaintiff was signed and acknowledged by Stine and F. S. Belcher and their wives, and at that time handed to F. S. Belcher as the agent of the plaintiff, but due to an oversight it was not recorded at that time. On June 13, 1913, defendant obtained a judgment against Stine in Union County, where it was docketed, and on August 12, 1913, a transcript thereof was docketed in Multnomah County. The occupation of the purchasers Beaumont and Sweet or their assignees continued until after the judgment was docketed and this suit was commenced. There was a decree for plaintiff from which defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. Turner Oliver, Mr. Charles H. Finn* and *Mr. Rogers MacVeigh,* with an oral argument by *Mr. Oliver.*

For respondent there was a brief over the name of *Messrs. Littlefield & McGuire,* with an oral argument by *Mr. Robert F. McGuire.*

MR. JUSTICE BENSON delivered the opinion of the court.

1, 2. Upon the facts as above stated we are called upon to decide whether or not plaintiff's unrecorded deed is superior to the lien of defendant's docketed judgment. Counsel for defendant urge that the evidence does not establish a delivery of plaintiff's deed. The defendant can only question the delivery of the conveyance so far as it involves the interest of the grantor Stine, and as to his interest, at least, the evidence is clear that the deed was delivered to the son as the agent of his mother. The conveyance was executed at a time when, so far as the record discloses, there were no creditors to complain and the transaction carries no taint of fraud. The judgment was not docketed in Multno-

mah County until nearly four years after the transfer of the property to plaintiff. Prior to such transfer and at all times subsequent thereto, and until after this suit was commenced, the properties involved were in the open and notorious occupancy of strangers to the legal title; that is, of the holders of contracts for the purchase of the land.

3, 4. In support of the contention that the lien of its judgment is superior to plaintiff's deed, defendant relies upon the language of Section 207, L. O. L. The effect of this statute was first considered by this court in *Stannis* v. *Nicholson,* 2 Or. 332, in which it was held that a judgment lien cannot, by virtue of that act, prevail over known equitable rights, and this view has been consistently maintained in many decisions since then. In one of these, *Laurent* v. *Lanning,* 32 Or. 11, 18 (51 Pac. 80), Mr. Justice WOLVERTON says:

"It has become the settled construction of this statute that a judgment lien, in order to have precedence over a prior unrecorded deed or mortgage, must have been taken or acquired in good faith, without notice or knowledge of such prior unrecorded conveyance or mortgage, thus putting the judgment lien creditor upon the same footing as if he had subsequently acquired a deed to the same premises."

In *Randall* v. *Lingwall,* 43 Or. 383 (73 Pac. 1), Mr. Justice BEAN says:

"It seems to be well settled that the open, exclusive, and notorious possession of property by a stranger to the title is sufficient to put those who deal with it upon inquiry concerning the rights and equities of the party in possession, and to charge them with knowledge thereof when no inquiry is made."

Defendant urges that in this case the occupants of the premises prior to the execution of plaintiff's deed are the same people who occupied them afterward. We

cannot see that the identity of the occupants makes any substantial difference in the result for the fact at all times remained the same—they were strangers to the title and possessed the information which should have informed defendant of plaintiff's equities. We conclude that the decree of the trial court should be affirmed and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MOORE concur.

Argued January 3, reversed and remanded March 12, 1918.

ALLIANCE TRUST CO. *v.* HUBBARD.

(171 Pac. 550.)

Appeal and Error—Necessity of Remand—Receiver's Accounts.

1. In suit to foreclose mortgages, the court, pursuant to their stipulations, having appointed a receiver to take charge of and collect the rents and profits of the property, and such receiver having collected the rents and paid current expenses, it will be necessary for the trial court to ascertain the amount the receiver has to apply on plaintiff's mortgages, and the suit will be remanded for final decree after making deduction of the amount available.

Attorney and Client—Acting for Different Parties.

2. Where an owner contracted for the erection of a building, and gave mortgages to secure the money, there was no impropriety in her attorney's acting as attorney for the contractors against the bank which advanced the money for construction after his relations with the owner, as her attorney, had ceased.

Mortgages—Priority of Liens—Assignment of Lease.

3. A note executed by the owner of a building and secured by her assignment of a lease of part thereof created a lien which must be postponed to the liens of the owner's mortgages, except in so far as one of the mortgages, subsequent to the assignment, may be affected by the rentals that have been or may be collected on the lease.

[As to priority as between purchase-money mortgage and other lien or claim, see note in Ann. Cas. 1916C, 945.]

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

On May 14, 1912, plaintiff, the Alliance Trust Company, Limited, loaned to defendant, Fanny E. Hubbard, $45,000 and as security for the payment thereof she executed and delivered to it a mortgage upon the east half of lots 1 and 2 in block 20 in the City of Salem, upon which the Hubbard Building is situated at the southwest corner of State and High Streets, the mortgage covering other city property and also a farm of 202 acres near Salem. On June 7, 1912, the mortgagor repaid $15,000 of this loan and the property in block thirty of the City of Salem was released from the mortgage and the principal of the debt was reduced to $30,000. The loan was to be used in the erection of the Hubbard Building. Subsequently the mortgagor changed her plans in regard to the building and concluded to add two additional stories to the original plan, making four stories. To enable her to finance her larger plans she applied to the plaintiff for an increase of loan. On September 16, 1912, plaintiff loaned her an additional sum of $30,000, and to secure the same she executed to plaintiff a second mortgage covering the Hubbard Building property and the farm. This loan was evidenced by a series of nine principal notes, eight for $2,000 each, one maturing on the first day of May and November of each year from November 1, 1913, to May 1, 1917, and one for $14,000 maturing November 1, 1917. Upon the completion of the building Mrs. Hubbard found herself unable to meet her obligations to her contractors, the defendants, Welch Brothers, and in order to prevent lien foreclosures she applied to plaintiff for a third loan of $10,000. On July 28, 1913, plaintiff loaned her this sum, taking her note for the same and as security she executed a

third mortgage covering the Hubbard Building property and the farm. Each of the principal notes was so drawn as to bear interest after maturity at the rate of 8 per cent per annum. The loan secured by the first mortgage was to bear interest from date until the maturity of the principal note at the rate of 7 per cent per annum as evidenced by a series of ten interest notes representing semi-annual installments of interest payable May 1st, and November 1st of each year from November 1, 1912, to May 1, 1917. The loan secured by the second mortgage was to bear interest from date until maturity at the rate of 7 per cent per annum, as evidenced by a series of eleven interest notes representing semi-annual installments of interest payable May 1st and November 1st of each year from November 1, 1912, to November 1, 1917. The loan secured by the third mortgage was to bear interest from date until maturity at the rate of 8 per cent per annum as evidenced by a series of nine interest notes representing semi-annual installments of interest payable May 1st and November 1st of each year from November 1, 1913, to November 1, 1917. Among other covenants contained in plaintiff's mortgages was one that the mortgagor would keep the buildings upon the mortgaged premises insured against loss or damage by fire in the sum of $50,000, and it was provided that if the mortgagor should fail to procure such insurance or fail to pay the premiums therefor, the mortgagee might procure such insurance and at its option pay the premiums therefor, and any amount so paid with interest at 10 per cent per annum should be added to and become a part of the debt secured by said mortgages. The mortgagor failed to keep up her insurance as agreed and, in order to protect its lien the plaintiff on May 15, 1915, advanced and paid insurance premiums to the amount

of $927, no part of which was ever paid by the mortgagor.

The mortgagor wholly failed to comply with the conditions of said mortgages. She defaulted in the payment of taxes for the year 1914; in the payment of interest on all of said loans; and in the payment of installment principal notes secured by the second mortgage. By reason of these defaults on August 18, 1915, plaintiff commenced this suit in the Circuit Court for Marion County for the foreclosure of all of said mortgages. At that time, in addition to the arrears of $927 in insurance premiums, the mortgagor was in default to the amount of $1,050, interest on the first mortgage; $2,100, interest on the second mortgage; $8,000, principal on the second mortgage; and $800, interest on the third mortgage; besides a large amount of accrued interest on the delinquencies. In each of plaintiff's mortgages the mortgagor expressly agreed that in case of foreclosure she would pay such a sum as the court might adjudge reasonable as attorney's fees to be allowed the plaintiff in such suit. In the complaint it was alleged that $2,000 was a reasonable sum to be allowed as attorney's fees for the foreclosure of the first mortgage; $2,000 for the second mortgage; and $1,000 for the third mortgage. Plaintiff asked for $927 for insurance premiums paid by it. On August 30, 1915, defendant, Fannie E. Hubbard, filed an answer admitting every allegation of plaintiff's complaint, except certain portions not material to this appeal, and except as to the reasonableness of the attorney's fees, admitting that $500 would be a reasonable fee for each of said mortgages. On April 20, 1916, she filed an amended answer expressly admitting all the other allegations of the complaint. She withdrew her admission as to the $927, insurance item, and

denied that plaintiff had been compelled to advance more than $630 for such insurance premiums; and so amended her answer as to admit $250 a reasonable fee for foreclosing each of the three mortgages, or a total of $750. After considerable delay, on December 21, 1916, a decree was entered in favor of the plaintiff and against the defendants.

Plaintiff was given judgment against defendant, Fannie E. Hubbard, for all amounts prayed for upon the several notes and secured by the respective mortgages. But upon the item of insurance premiums plaintiff was only allowed judgment for $630, and an aggregate sum of $750 as attorney's fees. By the terms of the decree it was further provided that no execution should be issued to enforce the same before November 1, 1917. From the provisions of the decree relating to the items of insurance and attorney's fees and the inhibition concerning the issuance of execution, the plaintiff appeals. None of the defendants appealed from the decree in favor of plaintiff.

REVERSED AND REMANDED.

For plaintiff-appellant, the Alliance Trust Company, Limited, there was a brief and an oral argument by *Mr. Earl C. Bronaugh.*

For defendant-appellants, Welch Bros., there was a brief with oral arguments by *Mr. John Bayne* and *Mr. John H. McNary.*

For defendant-appellant, John Bayne, there was a brief over the name of *Messrs. Smith & Shields,* with an oral argument by *Mr. Guy O. Smith.*

For defendant-respondent, The United States National Bank of Salem, Oregon, there was a brief over

the name of *Messrs. Carson & Brown,* with an oral argument by *Mr. Thomas Brown.*

For defendant-respondent, Fannie E. Hubbard, there was a brief with an oral argument by *Mr. Alva O. Condit.*

MR. JUSTICE BEAN delivered the opinion of the court.

After reading the 411 pages of typewritten testimony, much of which is immaterial, and a recitation of which would be of no value to anyone, we will consider the plaintiff's appeal before taking up those of the defendants, Welch Brothers, and John Bayne. As to the premiums for the insurance it is shown that while it would have been possible to obtain a less rate, that paid by the plaintiff was the regular rate for property of that kind in the City of Salem at that time. It may be that the plaintiff could have obtained insurance for a term of three years at a less rate, and Mrs. Hubbard complains that this was not done. It is nowhere shown, however, that at the time of her request for insurance she suggested that the plaintiff obtain an insurance policy for a longer time, and it does not appear that plaintiff was aware that a long time would elapse before the matter would be in some way adjusted. The amount of insurance premiums of $927 paid by plaintiff according to the terms of the mortgages was reasonable as a valid claim to be added to plaintiff's mortgages and is allowed. According to the judgment of practicing attorneys, the evidence as to a reasonable sum for attorney's fees, foreclosing the three mortgages for the principal sums of $70,000, and interest and insurance premiums, was 5 per cent on the amount due, for services in the Circuit Court, and from $300 to $1,000 in case of an appeal. Con-

sidering all the facts relating to plaintiff and the various defendants we think the reasonable amount to be allowed plaintiff for attorney's fees in this suit is $2,500. November 1, 1917, the time limited by the lower court for the issue of execution has passed and the matter need not be considered at length. Plaintiff was entitled to have execution issue.

1. It appears from the record that pursuant to the stipulations of the mortgages the court appointed a receiver to take charge of and collect the rents and profits of the mortgaged property; that the rents have been collected; and the current expenses of the property have been paid by the receiver. It will be necessary for the trial court to ascertain the amount which the receiver has to apply upon plaintiff's mortgages, and the suit will therefore be remanded to the Circuit Court for a final decree to be entered, after making a deduction of the amount available for such purpose.

MORTGAGE OF DEFENDANTS, WELCH BROTHERS.

On May 28, 1912, defendant, Fannie E. Hubbard, made a contract with defendants, Welch Brothers, for the construction of the Hubbard Building which they immediately commenced. Afterwards the contract was modified and two additional stories, with other alterations, were added to the building. The agreement then was that Welch Brothers should construct the building for the actual cost thereof plus $4,800 commission. It was completed about January 1, 1913, when Mrs. Hubbard and Welch Brothers had a settlement as to its cost. On January 29, 1913, Welch Brothers filed a mechanic's lien for the balance which they claimed to be then due therefor. Mrs. Hubbard made some payments before February 18, 1913, when she and Welch Brothers entered into an agreement that

the cost of the building under the terms of the contract for the construction thereof, including commission to the contractors, amounted to $74,016.74 and that there had been paid on account thereof $55,584.57, leaving a balance due Welch Brothers of $18,432.17; that Mrs. Hubbard would pay interest on such balance at the rate of 8 per cent per annum from the date of filing the lien; and that Welch Brothers would defer the foreclosure of such lien for five months from the date of filing the same. This was in order to give Mrs. Hubbard an opportunity to secure the money for the payment of the balance. Subsequently Mrs. Hubbard paid $20 to the Oregon Art Tile Company which was credited upon the balance, leaving $18,412.17. Mrs. Hubbard was unable to secure sufficient money to pay Welch Brothers, but obtained an agreement from the plaintiff to loan her $10,000 to be paid them and to be secured by its third mortgage provided Welch Brothers would release their mechanic's lien and take a note secured by a fourth mortgage for the amount due after applying the $10,000. A written agreement that this should be done was entered into on July 26, 1913, and on July 28, 1913, after the payment of the $10,000 to Welch Brothers, it was ascertained that the balance due them from Mrs. Hubbard was $9,148.65, and Mrs. Hubbard executed to them a note and mortgage to secure the payment of the amount. Mrs. Hubbard paid interest to Welch Brothers on that note and mortgage to January 28, 1915, but failed to pay the interest due July 28th of that year. On August 30, 1915, Welch Brothers filed their answer and cross-complaint setting up their note and mortgage. No answer was filed to this cross-complaint until April 21, 1916, when by leave of court Mrs. Hubbard answered it. The mortgage of Welch Brothers covered the in-

come of the mortgaged premises as well as the premises themselves. In her answer Mrs. Hubbard set up that she had paid Welch Brothers over $65,000 on account of the construction of the building for which they had never accounted to her, and that by misrepresentations and misstatements they induced her to sign such note and mortgage to them and that she believed that if an accounting were had it would appear to the court that they misappropriated funds and that she was not indebted to them in any sum. This was denied by the reply. Defendants Welch Brothers were required by the trial court to make another accounting which they did. There are no facts or circumstances alleged in the answer to Welch Brothers' cross-complaint sufficient to impeach the note and mortgage. Passing this, however, the evidence which we have carefully weighed shows that the main difficulty in the construction of the building was that it cost more than Mrs. Hubbard expected and perhaps she was unable to realize from the income the amount she had expected to be able to apply to the satisfaction of the indebtedness. The evidence, the several settlements, and the accounting made in the trial court show that the business was conducted on her behalf in a fair business-like way. The money paid by Mrs. Hubbard to Welch Brothers and the balance due them, for which the note and mortgage were given, are shown to have been expended in the construction of the building, with the exception of their commission of $4,800. Much of the material for the building was purchased from reliable business concerns at competitive prices. Mrs. Hubbard had the services of an architect against whom there is no complaint, and the erection of the structure was superintended under his direction during all the time consumed in its construction. Mrs. Hubbard

understood all the facts and circumstances relating to the construction of the building at the time of the settlements which were evidenced by written agreements with Welch Brothers, as well as she or any of her witnesses did at the time of the taking of the evidence. There is in evidence some random guesses made by contractors to the effect that they estimated the cost of the third and fourth stories of the building at a much less figure than the actual cost. There were also figures made by a contractor estimating the cost of the two additional stories from the plans and specifications. Important changes were made in these plans. They were not followed in the construction. A portion of the first story was constructed for a depot for the Oregon Electric Railway Company. The building contains a theater, a photograph gallery and a barber-shop. Radical changes were made in the arrangements for the elevator necessitating a change in the roof thereof and other alterations were made in order to effectuate the conveniences for the several uses for which the building was designed. It seems to us that the questions of law involved are too plain for discussion. The trial court rendered a decree canceling the note and mortgage of Welch Brothers executed by defendant Fannie E. Hubbard to Welch Brothers and awarding her costs and disbursements. The decree of the lower court in this respect is reversed and one will be directed to be entered in that court in favor of Welch Brothers for the sum of $9,148.65 with interest at the rate of 8 per cent per annum from January 28, 1915, together with the further sum of $400, attorney's fees in this suit, and foreclosing their mortgage as prayed for in their cross-complaint. The mortgage of defendants, Welch Brothers, will be declared to be next in time and right

to the mortgages of the plaintiff. Welch Brothers' mortgage covers the income from the mortgaged premises and provides that the net amount thereof shall be applied to the payment of plaintiff's mortgages and then to the mortgage of Welch Brothers. It is claimed by Welch Brothers that between September 5, 1913, and August 2, 1915, Mrs. Hubbard expended a portion of the income of the mortgaged premises to the amount of $759.79 in purchasing furniture and furnishings for the rooms in the Hubbard Building, and that the same are now in said building and are a part of the income thereof and subject to their mortgage. The funds mentioned are not traced and the personal property is not segregated nor described in the record so as to enable this court to render a decree in regard thereto.

MORTGAGE OF JOHN BAYNE.

2. During the time of the construction of the Hubbard Building and for a long time prior thereto defendant John Bayne was employed by Mrs. Hubbard as attorney and counselor and rendered services in regard to various matters as her attorney and business manager, all of which are detailed in the evidence at great length. On July 23, 1912, Mrs. Hubbard executed to defendant Bayne a promissory note in the principal sum of $500 due on or before three years from date. On January 2, 1915, she executed another note for $1,000 in favor of Bayne with interest at 6 per cent per annum in consideration of services rendered. On August 3, 1915, to secure these notes Mrs. Hubbard executed a fifth mortgage on the premises mortgaged to plaintiff and defendants Welch Brothers. No payment was made on these notes except $30 interest on the $500 note on August 2, 1913. On October 6, 1915, defendant Bayne answered the complaint of the Alli-

ance Trust Company and by a cross-complaint set up his notes and mortgage. Defendant Hubbard filed no answer to this cross-complaint until April 21, 1916, when she applied to answer. Her answer admits that she signed the $500 note and the $1,000 note and executed the mortgage; that no payments have been made on the smaller note except $38 on August 2, 1913; that no payments have been made on the $1,000 note; and denies the remainder of the cross-complaint. She further alleges that for many years John Bayne acted as her attorney; that she paid him a large amount of money on account of his alleged services, the amount of which she is unable to state; and that he never accounted to her therefor; that during the years 1912, 1913, 1914 and a part of 1915, while she was engaged in the construction of the Hubbard Building, under contract with the defendants Welch Brothers, defendant John Bayne acted as attorney and legal adviser for her and that she

"has been informed and believes that during said time the said defendant, John Bayne, was acting as attorney for defendants, Welch Brothers; and that the interests of said Welch Brothers were antagonistic to the interests of this defendant and that the said defendant, John Bayne, did not properly safeguard and protect the interests of this defendant, and that through the negligence and inattention of said defendant, John Bayne, a large amount of money has been lost to this defendant";

that at the time of giving the notes mentioned in Bayne's cross-complaint he represented to her that the amounts named in the notes were due from her to him; and that this defendant relying upon said representations executed said notes,

"but that this defendant is informed and believes that if said defendant John Bayne were required to properly account to this court for the moneys received by

him from this defendant and for the services rendered that it would be ascertained by the court that no money is due to said defendant John Bayne, from this defendant."

The allegations of the answer to Bayne are but little more, if anything, than an insinuation. No facts are alleged showing that the notes were executed without consideration or were fraudulent. Neither does the evidence of the case show any defense to the notes or mortgage. The court required an accounting to be made from the evidence in regard to which it appears that every dollar was accounted for by the attorney and that faithful services were rendered by Bayne in behalf of Mrs. Hubbard. It is plainly demonstrated that there was no foundation existing for the allegations of Mrs. Hubbard in this respect and that she was ill-advised as to the matter upon which to base her belief and frame her answer. The money for which the notes were given was earned by the defendant Bayne, a fair settlement therefor was made with Mrs. Hubbard, and the notes were executed. In an endeavor to protect him she executed the mortgage in question. After the termination of the business relations between defendant Bayne and Mrs. Hubbard and the settlement therefor, at the request of Welch Brothers, Bayne acted as attorney for them and filed an answer in a suit commenced by the plaintiff to foreclose its mortgages. He was no longer in the employ of Mrs. Hubbard and knew of no contemplated defense to the mortgage of Welch Brothers. When controversy arose between Mrs. Hubbard and Welch Brothers in regard to their accounting, Mr. Bayne had other counsel appear with him in the case. We see no impropriety in his acting as attorney for Welch Brothers after his relations with Mrs. Hubbard as her

attorney had ceased. The fact that Bayne drew the mortgage to Welch Brothers which was examined by other counsel for the contractors constitutes no defense to either of the mortgages in question. Counsel for Mrs. Hubbard stated at the trial that there was no objection to Attorney Bayne's appearing in the suit for Welch Brothers. The trial court rendered a decree canceling the notes and mortgage of defendant John Bayne. This decree is reversed and one directed to be entered in favor of defendant John Bayne for the amount of his notes and the foreclosure of his mortgage as prayed for in his cross-complaint. The sum of $150, attorney's fees, is allowed as a reasonable amount for foreclosing such mortgage. The mortgage of defendant John Bayne will be declared to be next in time to the mortgages of plaintiff and the mortgage of defendants Welch Brothers.

CLAIM OF UNITED STATES NATIONAL BANK.

3. On April 29, 1914, defendant Fannie E. Hubbard obtained a loan from the defendant, United States National Bank, amounting to $4,775, for which she executed a promissory note payable on demand with interest at the rate of 8 per cent per annum. In order to secure the payment of the same Mrs. Hubbard assigned a lease made by her to the Oregon Electric Railway Company, a corporation, on February 16, 1912, for a portion of the Hubbard Building, and authorized the company to pay the monthly rentals to the bank. This note has been reduced to the amount of $1,241, and interest thereon from the date of the note, by payment of such rentals and by payments made by Mrs. Hubbard. It follows that the decree of the Circuit Court as to the United States National Bank for the sum of $1,241, with interest at the rate of 8 per cent

per annum from September 30, 1915, and for $75 attorney's fees, declared to be a lien upon said Hubbard Building and the land upon which the same is situated, will be postponed to the liens of the mortgages above mentioned, save and except in so far as the mortgage of John Bayne may be affected by the rentals that have been or may be collected upon the said lease, which assignment of lease is prior in time to the mortgage of defendant John Bayne. The decree of the lower court as to the defendant, United States National Bank, will be modified accordingly.

All necessary computation and adjustment not herein specified can be made at the time of the accounting of the receiver herein provided for. The cause will therefore be remanded to the lower court for such accounting and entry of decree therein in accordance herewith.

REVERSED AND REMANDED.

MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT took no part in the consideration of this case.

Argued February 21, reversed and remanded March 12, 1918.

SMITH *v.* MEIER & FRANK INV. CO.

(171 Pac. 555.)

Statutes—Common Law.

1. Statutes in derogation of the common law must be construed strictly.

Municipal Corporations—Sidewalks—Negligence.

2. To constitute negligence predicated on violation of a city ordinance by abutting property owner, there must first be a duty owing by defendant to plaintiff.

[As to violation of ordinance, not intended for plaintiff's benefit as actionable negligence, see note in **Ann. Cas.** 1912D, 1106.]

Municipal Corporations—Sidewalks—Negligence.

3. Under Portland ordinance, requiring property owners to remove snow from sidewalks, and imposing penalty for failure to do so, where defendant failed to remove snow and ice during period of alternate thawing and freezing weather, and plaintiff fell and was injured, the violation of the ordinance, without any affirmative act against plaintiff, did not imply a cause of action in his favor, and he could not sue as a relator in the city's name.

Municipal Corporations—Sidewalks—Negligence.

4. Portland City Charter, Section 398, making abutting owners liable civilly to pedestrians injured by defects in sidewalks, does not impliedly raise cause of action in favor of pedestrian, who fell on walk from which the owner had failed to remove snow and ice, in violation of city ordinance imposing penalty therefor.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

The plaintiff alleges and the defendant admits that the latter is a corporation existing under the laws of this state, and that it was the owner of certain unimproved and unoccupied platted lots in the City of Portland, in front of which at the time mentioned in the complaint there was constructed and maintained a sidewalk as part of the adjacent street. The plaintiff states that at the time of and long prior to the injuries of which he complains there was in force in the City of Portland an ordinance, containing among other provisions the following:

"Section 1. The tenant or occupant or any person having the care of a building or of land bordering on a street where there is a sidewalk, within the corporate limits of the City of Portland, or if there is no tenant, occupant, or other person having the care of the whole of such building, or of any such land, the owner thereof shall, within the first four hours of daylight after the ceasing to fall of any snow, cause the same to be removed therefrom the entire length of said premises, and for a space not less than three feet in width. * *

"Section 3. Whenever any portion of a sidewalk is encumbered with ice the tenant or occupant of a building or of land adjoining a street whereon is such side-

walk, or in case there is no occupant of the whole of such building of any such land, the owner or other person having the care of the same, shall cause such sidewalk to be made safe and convenient by removing the ice therefrom, or by covering the same with sand, ashes, or some other suitable substance, within the first three hours of daylight after the formation of said ice.

"Section 4. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof before the police court, shall be punished by a fine of not less than five dollars nor more than twenty dollars."

It is averred in substance that there was a heavy fall of snow during the month of January, 1916, which the defendant permitted to lie on the walk and become icy and slippery, on account of the more than two weeks alternate thawing and freezing weather prevalent at the time; and that while walking on the sidewalk plaintiff fell, on account of which his leg was broken and other injuries were inflicted, for which he claims damages.

A general demurrer to the complaint having been overruled, all its allegations except as noted, were traversed by the answer. The defendant alleges that the sidewalk itself was safe and complied with all the specifications and requirements of the legislation of the City of Portland on that subject; that the alleged unsafe and dangerous condition thereof, if any existed, was due to an act of God and without any instrumentality on the part of defendant; and, finally, that the injury sustained by the plaintiff, if any, was due to his negligence in going upon the walk with knowledge of its condition. The new matter of the answer was denied by the reply. A jury trial resulted in a judgment for the plaintiff, from which the defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Joseph & Haney* and *Mr. P. F. A. Boche,* with an oral argument by *Mr. Bert E. Haney.*

For respondent there was a brief over the names of *Mr. Charles A. Hart* and *Mr. M. E. Crumpacker,* with an oral argument by *Mr. Hart.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1–3. The crucial question in this case is the effect to be given to the city law the provisions of which have been quoted. It is axiomatic that statutes in derogation of the common law must be construed strictly. An examination of the ordinance discloses that the only liability thereby established which would affect the defendant is that of a fine. No cause of action in favor of any private person is mentioned. To constitute negligence predicated on the violation of a city law there must first be a duty owing by the defendant to the plaintiff. No such obligation is stated in express terms in the ordinance. If any exists, it must be by implication. We may concede without deciding that the city has the right under certain circumstances, if authorized by its charter, to impose upon an owner of abutting realty the duty of keeping a part or all of the street in front of his premises in suitable condition for the use of the public and may couple with the performance of that duty, primarily resting upon the city, not only a fine but liability to individuals who can trace their injuries to the householder's disobedience of the city enactment. But the question here is whether there is necessarily implied in the requirement to keep the snow removed from the sidewalk any further liability than the prescribed fine. Treating of this point in *Bott* v. *Pratt,* 33

Minn. 323 (23 N. W. 237, 53 Am. Rep. 47) the principal case relied on by the plaintiff, the court said:

"But whether a liability arising from the breach of a statutory duty accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character must depend upon the nature of the duty enjoined, and the benefits to be derived from its performance."

Cited in support of the text quoted are the following precedents: *Patterson* v. *Detroit etc. R. Co.*, 56 Mich. 172 (22 N. W. 260), was an action by a traveler against the railroad company for damages caused by the latter obstructing a highway in violation of the provisions of a statute forbidding railroads to impede traffic at a street crossing longer than five minutes. Another case was *Parker* v. *Barnard,* 135 Mass. 116 (46 Am. Rep. 450), where the injury arose through the defendant's disregard of a statute calling for the protection of a hatchway by railing. In *Salisbury* v. *Herchenroder,* 106 Mass. 458 (8 Am. Rep. 354), the damage was occasioned by the falling of a sign which had been suspended by the defendant over a street, contrary to the city ordinance. *Owings* v. *Jones,* 9 Md. 108, 117, arose out of the neglect of the defendant to comply with a city ordinance prescribing a mode in which vaults in the public streets should be protected. *Devlin* v. *Gallagher,* 6 Daly (N. Y.), 494, was an instance where the grievance arose from disregarding a certain statutory precaution required in blasting operations. In *Baltimore City Pass. R. R. Co.* v. *McDonnell,* 43 Md. 534, 552, the railroad company violated the ordinance limiting the speed of cars to six miles an hour and the jury was allowed to consider whether the accident would have been averted if the cars had not been moving faster than the lawful rate. And, lastly, *Hayes* v. *Michigan Central R. R. Co.,* 111 U. S. 228, 240, 28 L. Ed. 410, 4

Sup. Ct. Rep. 369, was predicated upon a hurt inflicted by a train moving on an unfenced track. The fencing was required under a charter empowering the city to compel railroad companies to provide protection against injury to persons and property in the use of such railroads. In all these instances the damages were the result of the operation of some positive agency in the primary control of the defendant, affecting a certain individual, as distinguished from the general public. In the case at bar the condition out of which the injury arose was not caused by any act of agency of the defendant. The plaintiff does not and cannot sue as a relator in the name of the city and the violation of its ordinance without any affirmative act of the defendant directly affecting him does not imply a cause of action in his favor.

4. The charter of the City of Portland in force at the time provided among other things:

"It is not only the duty of all owners of land within the city to keep in repair all sidewalks, constructed or existing in front of, along, or abutting upon their respective lots or parts thereof, and parcels of land, but such owners are hereby declared to be liable for all damages to whomsoever resulting, arising from their fault or negligence in failing to put any such sidewalk in repair, after the owner or agent thereof has been notified as provided in this charter so to do; and no action shall be maintained against the City of Portland by any person injured through or by means of any defect in any sidewalk": Section 388.

The limit of the city's power under that charter would be to visit a liability upon the property owner for not putting the sidewalk itself in repair. It has no reference to making him liable for anything further, and remembering the strictness in which statutes in derogation of the common law are to be construed, it is plain that the excerpt quoted gives no countenance to the implica-

tion of a cause of action based upon the ordinance mentioned. The cases of *Morgan* v. *Bross,* 64 Or. 63 (129 Pac. 118), and *McClaugherty* v. *Rogue River Electric Co.,* 73 Or. 135 (140 Pac. 64, 144 Pac. 569), cited by the plaintiff depend upon a general statute of the state known as the employers' liability law, which not only prescribes the duties of owners, contractors and others, but also makes their disobedience of its injunctions a basis for an action in favor of sundry persons who may be injured thereby. The right of action is grounded on the express terms of the statute and does not arise by implication in those cases. In our judgment, the snow and ice ordinance mentioned does not either expressly or impliedly give to an individual any right of action against the persons named therein who fail to obey. The only liability imposed is that of a fine at the behest of the city which had imposed its own primary duty upon them.

The demurrer to the complaint should have been sustained. The judgment of the Circuit Court is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MR. JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued January 4, affirmed January 29, rehearing denied March 19, 1918.

HILLS v. CAMPBELL.

(170 Pac. 298.)

Landlord and Tenant—Right to Rescind Contracts—Fraud—Waiver.

1. Where a tenant was induced to lease an apartment house and purchase the furniture therein by fraud and false representations, and paid rent after full knowledge of the fraud, she waived her right to rescind.

[When, how and by whom right of rescission may be exercised, see note in 50 Am. Dec. 672.]

From Multnomah: HENRY E. McGINN, Judge.

Suit by Nancy A. Hills against Floyd J. Campbell to rescind a contract. From a decree dismissing the complaint and granting defendant the affirmative relief prayed for in his answer, plaintiff appealed. Affirmed.

Department 1. Statement by MR. JUSTICE BENSON.

This is a suit to rescind a contract involving the alleged purchase of the furniture in an apartment house, and a lease of the building. The complaint alleges that the defendant was the owner of both, and that he induced her to enter into the contract by certain false and fraudulent representations as follows: (1) That the premises were free from bedbugs and other vermin; (2) that all of the 28 apartments were then filled with reliable tenants; (3) that the previous tenant had been taking in from $500 to $600 from the rentals of such apartments; (4) that the plumbing was adequate and in good repair; (5) that the fuel for heating the building would not cost more than $30 in any one month and that by covering the pipes and boilers with asbestos the cost could be materially reduced; (6) that the previous tenant was clearing at

the time of the sale, more than $250 per month and that plaintiff could clear at least $350 per month on an average; (7) that the furniture and other personal property in the building were worth more than $1,600 and that if plaintiff would pay him $1,600 therefor he would execute to her a valid bill of sale thereof, and replace any and all articles named in the inventory thereof which should be found missing; that he would advise, counsel and assist plaintiff in the management of the house, so that it should be a successful venture; that plaintiff was ignorant of and without experience in the management of an apartment house and so informed defendant; that all the representations made by defendant were false and fraudulent and made with the intent to deceive plaintiff and that she relied upon them and was injured thereby. These allegations are followed by averments to the effect that the house was so infested with bedbugs as to render it valueless; that the fuel cost was greatly in excess of the amount represented; that many of the tenants were nonpaying "dummies"; that plaintiff refused to give her a bill of sale of the personal property, failed to cover the heating plant with asbestos and failed to fix the plumbing. It is asserted that many articles enumerated in the bill of sale were never delivered; that she was deceived into signing a lease containing terms to which she had not assented; and that she was fraudulently misled into executing a note and mortgage upon the furniture purporting to secure the payment of the monthly installments of rent. After reciting various items of damage, the complaint contains the following averments as to rescission:

"That plaintiff as soon as she learned that said statements and assertions made by defendant to her were false and untrue demanded of the defendant the repayment of the money that she had paid and the damages

that she had sustained, and offered to return to defendant all the said personal property in said 'Winston Apartments' and offered to surrender up the possession of said 'Winston Apartments' to the defendant. But the defendant refused to repay the plaintiff the said money she paid him, or the damages that she had sustained and refused to receive the return of said personal property or receive the surrender of the possession of the said 'Winston Apartments.' "

After denying all the allegations of the complaint, except the contract of leasing, the answer alleges that the personal property referred to was never owned by defendant, and was never sold by him, but was purchased by plaintiff from the former tenants, the Chrudinskys, from whom she received a bill of sale. Then follow the necessary allegations for affirmative relief upon the issue of rent due and the foreclosure of the chattel mortgage given to secure the same. Upon the trial, there was a decree dismissing plaintiff's complaint and granting the relief prayed for by defendant. Plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. W. E. Richardson, Mr. Samuel T. Richardson* and *Mr. A. R. Mendenhall,* with oral arguments by *Mr. W. E. Richardson* and *Mr. Samuel T. Richardson.*

For respondent there was a brief over the names of *Mr. Frank Schelgel, Mr. Claude Strahan* and *Mr. Waldamar Seton,* with oral arguments by *Mr. Schlegal* and *Mr. Strahan.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. The evidence in this case presents a startling array of contradictory testimony which cannot, in any man-

ner, be reconciled. Upon nearly all of the material issues the conflict is so glaring and complete that we are compelled to say that one line of testimony or the other must be willfully false. In many instances it is not possible to analyze the evidence in such a manner as to solve the mystery by applying the test of reasonableness or inherent probability. We shall, therefore, waste neither time nor space with an elaborate discussion of the evidence but shall content ourselves with a generalization of conclusions. The record does not sustain the contention that plaintiff purchased the personal property from defendant but rather than she got it from the Chrudinskys and so understood it and, with this, we dismiss all questions relating to the furniture and other chattels. Regarding the plumbing, we think it is clearly established that it was sufficient and satisfactory and that the difficulty in respect to it arose from the habit of the tenants in permitting various kinds of waste to get into the pipes, thereby choking them and retarding the flow toward the sewer. The other fraudulent representations are not established by a preponderance of the evidence, unless it be in relation to the bedbugs. With reference to this phase of the case, it may be said that there is no dispute as to the fact that the apartments were equipped with an exceptionally large and vigorous supply of this extremely unpleasant vermin, and it is also established that the defendant was informed upon the subject prior to his dealings with the plaintiff. He very positively denies, however, that the insects were mentioned during the negotiations with the plaintiff. The clash upon this disputed point is of small importance now for the plaintiff is very positive that she discovered their presence, and the falsity of defendant's alleged representations in regard to them,

on the first night she occupied the premises, which was on January 15th. During the first week of February, she paid a second month's rent in advance without making any demand for rescission upon that or any other ground. Indeed, the first reliable evidence of an intention to rescind is found in a letter written by her to the defendant, dated May 15th, which demanded as a part of the settlement a payment by him of the $1,600 which she had paid for the furniture and other chattels. The payment of rent, after full knowledge of the fraud, acts as a complete waiver of the right to rescind: *T. B. Potter Realty Co.* v. *Breitling,* 79 Or. 293, 305 (155 Pac. 179); 4 R. C. L., p. 514.

Taking into consideration all the established facts, we conclude that neither party is entitled to recover costs in either court; otherwise, the decree is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Rehearing denied March 19, 1918.

PETITION FOR REHEARING.

(171 Pac. 565.)

Mr. W. E. Richardson, Mr. S. T. Richardson and *Mr. A. R. Mendenhall,* for the petition.

Mr. Frank Schlegal, Mr. Claude Strahan and *Mr. Waldemer Seton, contra.*

Department 1. MR. JUSTICE BENSON delivered the opinion of the court.

Plaintiff's petition for a rehearing contains a renewed and elaborate discussion of the evidence but as

to that feature presents nothing which has not already received our careful consideration and therefore we have nothing to add to our former opinion. Counsel further urge that the case of *Potter Realty Co.* v. *Breitling*, 79 Or. 293 (155 Pac. 179), cited in the original opinion herein, is inconsistent with the holding of this court in *Jones* v. *McGinn*, 70 Or. 236 (140 Pac. 994), *McGowan* v. *Willamette Valley I. L. Co.*, 79 Or. 454 (155 Pac. 705), and *Jeffreys* v. *Weekly*, 81 Or. 140 (158 Pac. 522). A careful examination of these cases fails to sustain counsel's contention. In each of these cases there was prompt effort at rescission immediately after discovery of the fraud, while in the case of *Potter Realty Co.* v. *Breitling, supra*, as in the case at bar, there was lack of promptness in repudiating the contract and acts inconsistent with an intent to disaffirm. The petition is denied.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., BURNETT and HARRIS, JJ., concur.

Argued February 6, affirmed February 19, rehearing denied March 19, 1918.

YORK *v.* SOUTHERN PAC. CO.

(170 Pac. 927.)

Master and Servant—Question for Jury—Cause of Injury.

1. In action for death of servant by master's negligence, where an eye-witness saw the accident, which did not involve any probability as to its cause, the principle that, when there are two or more probable causes of an injury, the question should be submitted to the jury, did not apply.

Master and Servant—Action for Death of Servant—Direction of Nonsuit.

2. Nonsuit *held* properly directed in action under Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. Stats. 1916, §§ 8657–8665), for death of car-dumper killed while

attempting to board a train of flat cars in motion, where he was walking along by the standing train, and had opportunity to board it while standing still, but did not attempt to board it until it was in motion.

ON PETITION FOR REHEARING.

Master and Servant—Injuries to Servant—Scope of Employment—Necessity of Showing.

3. Although the complaint alleged that it was the deceased servant's duty to help the train crew in making up a train, and that while helping in switching he was killed, there was no error in taking case from jury in the absence of evidence that as a part of his duties he was required to board the moving train in switching, in doing which he missed the step and was killed, since in the absence of such showing it was entirely conjectural whether deceased was engaged in his employment or in his own affairs.

[As to liability of master to servant volunteering upon a duty with which he is not charged, see note in 85 Am. St. Rep. 622.]

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This action was instituted under the Federal Employers' Liability Act by Johanna York, the widow and administratrix of Lewis York, against the Southern Pacific Company and the Pacific Railway & Navigation Company, corporations, to recover damages resulting from the death of her husband which is averred to have been caused by the carelessness of the defendants' agents while he was employed on a work train on an alleged interstate railroad, extending from Hillsboro, Oregon, to Tillamook, in this state. The complaint substantially charges that on March 17, 1915, York was commanded by the defendants' agents to assist in cutting out cars from a train and in setting brakes thereon at Miami Rock Quarry, and in walking along the track, while obeying the order, he attempted to board the train when it was suddenly started, thereby hurling him to the ground, and causing his death. The specific acts of negligence relied upon as grounds for the recovery are set forth in substance as follows: (1) That the defendants failed to provide a safe place in which York

was required to perform the service demanded of him along the side of the railroad, which part of the way where he was hurt, was then obstructed with rocks, holes and ditches; (2) that the train on which he worked was started before he had given any signal for that purpose, and it was then the duty of the defendants' employees not to move the cars until so indicated by him, and that the train was suddenly put in motion without giving him an opportunity safely to board any of the cars; and (3) that these employees attempted unnecessarily to make a flying-switch on a graded curve, which part of the track was known by them to be dangerous.

The answer denies the material averments of the complaint and for a further defense alleges in effect that at the time of the accident York was and prior thereto had been employed by the defendant, the Pacific Railway & Navigation Company, an intrastate railroad, as a car dumper to unload upon and along the right of way ballast with which to build up and improve the roadbed; that on March 17, 1915, he negligently and without any directions therefor attempted to board a rapidly moving train and in doing so slipped, fell and was killed, which injury was not brought about by the carelessness of either defendant, but was caused by his own negligence. For a second defense, it is substantially alleged that prior to the accident York had been employed as a car dumper, and repeatedly rode on the defendants' trains where it was the practice to drop at the quarry spur-cars, of which usage he had full knowledge and appreciated the danger to be encountered in attempting to board a train when it was in motion, and that he assumed all the risks incident to such switching and getting upon cars under such circumstances.

The allegations of new matter in the answer were denied by the reply, and the cause being regularly called for trial the jury, by order of the court, were permitted in a body and in charge of an officer to visit the scene of the accident. Upon their return the plaintiff introduced the testimony of her witnesses, whereupon a judgment of nonsuit was granted and she appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. J. C. Simmons* and *Mr. Sidney S. Johnson,* with an oral argument by *Mr. Simmons.*

For respondents there was a brief over the names of *Mr. Ben C. Day, Mr. William D. Fenton, Mr. Ralph R. Moody, Mr. T. B. Handley* and *Mr. John F. Reilley,* with an oral argument by *Mr. Day.*

MR. JUSTICE MOORE delivered the opinion of the court.

MR. JUSTICE BEAN dissents.

The testimony received tends to show that Lewis York, at the time of his death, was 36 years old, in good health and for more than a year prior to the accident he had been employed by the defendant, the Pacific Railway & Navigation Company, upon one of its work trains on that part of its track which borders upon the Pacific Ocean and upon the northerly and easterly shores of Tillamook Bay. Near the station of Garibaldi on the north beach of that inlet from the sea is a switch on a curve of the main line which connects with a spur track that leads to the Miami Rock Quarry, from which stone pit trainloads of material were taken to build up and ballast the roadbed and for shipment to a jetty which was being constructed on the bar at the entrance to that bay. When earth

was being loaded with a steam-shovel upon cars at another place, Mr. York had signaled the engineer in charge of the locomotive, who, obeying the signs, caused the train to be moved in the requested direction so as to place a car in proper position to be loaded. When cars thus freighted reached the proper destination, Mr. York assisted in manipulating the brakes and the load being dumped he deposited the material along the right of way and elsewhere as directed.

A freight train was halted near Garibaldi, March 17, 1915, and the caboose and two rear box-cars were uncoupled and left standing on a trestle while the train was moved a short distance ahead and a carload of lumber was set off on a switch. The remainder of the train, said by a witness to consist of from 7 to 13 flat cars, were prepared to make a flying-switch upon the spur track leading to the quarry. These cars were made ready by releasing by hand the air confined in the brake cylinders, which operation is called "bleeding" the cars. On that day two brakemen assisted in the movement of the train at the spur track. One of them stood on a flat car near the locomotive while the other was stationed at the lever which operated the switch on the main line. The flying-switch was made by uncoupling the train when it was in rapid motion and allowing the locomotive to run along the main line. As soon as the engine passed the brakeman stationed at the target, he suddenly turned the switch and the momentum which the cars had thus attained shunted them upon the quarry spur, and beyond the line of the switch. The lever was then replaced by the brakeman and the locomotive backing up would be coupled with the cars which were left standing upon the trestle.

It is quite probable that the attention of the train crew mentioned was so occupied with the performance of their respective duties that neither member thereof saw the accident, or knew anything about it until informed of the injury by George Krumlauf, who was then standing on an embankment of the railroad about 60 feet from the place where Mr. York was killed and witnessed the entire scene. Krumlauf's testimony is to the effect that Mr. York, walking along the track beside the flat cars, released the air from the brake cylinders until he reached the locomotive. Having discharged that duty he began retracing his steps and as he was pursuing his journey and while he was opposite to the witness the train was started. York thereafter continued his course, walking about a car-length. In the meanwhile the train had attained a velocity of about 12 miles an hour and several cars passed him. When the rear end of the flat car next to the last approached, he grasped the handholds thereof and swung his feet towards the stirrup, but missing the step placed there for that purpose he fell, sustaining the injury of which he immediately died.

It appears that several globular rocks, about two feet in diameter, were partially imbedded in the earth, forming the slope of the roadbed about 6 or 8 feet from the rail on the side of the track where the accident happened. No obstruction of any kind, however, is mentioned as having been found on the berm of the grade along which Mr. York walked as near the ends of the ties as the width of the cars would safely permit. All the cars that were placed upon the spur track were supplied with handholds and stirrups, whereby a person accustomed to the service could safely have boarded the train when it was starting. No testimony was offered tending to show that it was

Mr. York's custom, except when loading cars, to indicate when they should be started, or that it might reasonably be expected he would on that occasion signal the engineer to move the train.

It is contended by plaintiff's counsel that the jury having visited the scene of the accident, thereby acquired such a knowledge of the *locus in quo* as to enable them carefully to consider and accurately to determine the degree of danger to be encountered at that place under the circumstances detailed, and such being true, an error was committed in granting the judgment of nonsuit. A different conclusion has heretofore been reached by this court which determined that the only purpose to be subserved by permitting a view of premises by a jury, was to enable them intelligently to apply the evidence received at the trial to the mental picture thus obtained, and that their verdict must be predicated upon the testimony of witnesses so given and not upon such observation: *Crane* v. *Oregon R. & N. Co.*, 66 Or. 317 (133 Pac. 810); *Molalla Electric Co.* v. *Wheeler*, 79 Or. 478 (154 Pac. 686). No valid reason is perceived for changing the rule thus established.

1. Invoking the legal principle announced in the case of *Hartman* v. *Oregon Electric R. Co.*, 77 Or. 310, 317 (149 Pac. 893, 151 Pac. 472), where it was said: "When there are two or more probable causes of an injury, the question should be submitted to the jury," plaintiff's counsel maintain that the facts herein bring the case within that rule and hence an error was committed in granting the nonsuit. In the case so relied upon, J. E. Harris, who was working in a tunnel which was then being cut for that defendant company, heard a scream and hastily going to the mouth of the excavation, he found the plaintiff's son lying dead, probably

from a shock of electricity which might have been caused from a defective switch or from lack of an assistant. As no person witnessed the death, the presumption was indulged that the deceased had exercised due care (*Cassidy* v. *Angell,* 12 R. I. 447 (34 Am. Rep. 690); *McBride* v. *Northern Pac. R. Co.,* 19 Or. 64 (23 Pac. 814), and it was held that no error was committed in submitting the case to the jury. In the case at bar, however, as Mr. Krumlauf witnessed the accident, which did not involve any probability as to its cause, there was no necessity to invoke any presumption as to the manner in which the injury was inflicted. No error was committed in this particular.

On the cross-examination of Mr. Krumlauf, the defendant's counsel referring to the interval occurring after the compressed air was released from the brake cylinders inquired:

"During the time the train was standing there York was walking back along the train?"

The witness replied, "Yes, sir."

"Q. What was there to prevent him from getting on the train while it was standing there?

"A. Nothing that I know of.

"Q. When the train started up, did it start slowly and then increase in speed?

"A. Yes, sir.

"Q. It kept going faster?

"A. Yes, sir.

"Q. When it first started off it started slow?

"A. Not so very slow.

"Q. What was there to prevent him from getting on when it first started up?

"A. I don't know; nothing, I guess.

"Q. Did the train start up with any big jerk or just in the usual way as they do in there in those flying-switches?

"A. Just like they usually do."

On redirect examination this witness was further asked: "How do they always start in making a flying-switch?

"A. They have got to start kind of fast.

"Q. And they started that way before Mr. York got on?

"A. Yes, sir."

Mr. York, having been in the employ of defendants more than a year and engaged in the service which he was performing when he was hurt, must have known when he assisted in preparing the cars to make a flying-switch, that the train would soon start, and as he could have boarded the cars at any place, self-preservation should have prompted him to do so before the train was put in motion.

2. A careful examination of all the testimony given at the trial fails to disclose any negligence on the part of the defendants' employees, that caused the injury set forth in the complaint. While contributory negligence is not a bar to the maintenance of an action of this kind, there must be some carelessness on the part of an employer or of his servant before any basis can be established upon which must be constructed the fabric of contributory negligence. Failing to find any testimony tending to create such foundation, no error was committed in granting the nonsuit. The judgment is therefore affirmed.

Affirmed. Rehearing Denied.

Mr. Chief Justice McBride and Mr. Justice McCamant concur.

Mr. Justice Bean delivered the following dissenting opinion:

As I view this case the solution thereof depends upon the determination of a question of fact. This

is demonstrated by the majority opinion by the learned justice in that part wherein it is found in effect that it was the duty of York, the decedent, to have boarded the cars before they were in motion at a different place from that at which he attempted to do so. To quote the exact language of the opinion:

"Mr. York having been in the employ of defendants more than a year and engaged in the service which he was performing when he was hurt, must have known when he assisted in preparing the cars to make a flying-switch, that the train would soon start, and as he could have boarded the cars at any place, self-preservation should have prompted him to do so before the train was put in motion."

The manner of performing the services by the plaintiff's decedent pursuant to his duty is indicated principally by the circumstances as they actually occurred as detailed by Krumlauf, an eye-witness to the catastrophe. From these circumstances different minds might reasonably draw a different conclusion from that deduced by the learned justice. There is another phase of the case that seems to go hand in hand with that referred to. A jury might fairly conclude from the evidence that York was performing his duties in the regular way and that it was necessary for him to board the cars that were being switched on to the spur track at the rear of such cars as he was endeavoring to do in order properly to set the brakes and hold the cars when they reached their destination near the quarry; that if he had got on to the front part of the cars he would have had to walk to the rear on moving cars to his great danger; that it was careless and dangerous for the cars to be started and moved at the rate of about 12 miles an hour before York got aboard; and that in the exercise of due care those in charge of the train should have observed that the workman had

boarded the cars which were to be left in his charge before the same were suddenly started and should have waited a few seconds longer for him to do so. It might appear to a jury that in working around the dump-cars and grading the road for about a year York had had but little real experience in performing duties similar to those required of a regular brakeman, and that greater care was necessary for his reasonable safety than if the cars were being switched by an expert brakeman. The majority opinion seems to impute negligence to the workman because he attempted to board a moving car instead of getting on at another place before the cars were put in motion. It is not negligence *per se* to get on or off a moving train: *Eidem* v. *Chicago, Rock Island & P. R. Co.,* 158 Ill. App. 82. We quote from *Louisville & N. R. Co.* v. *Bargainier,* 168 Ala. 567 (53 South. 138):

"This court has time and time again held that it is not dangerous or negligence *per se* to get on or off a moving train or engine."

It is stated in 3 Labatt's Master & Servant (2 ed.), Section 1254 (5), as follows:

"In some cases the mere fact that a servant attempted to mount a moving train without any necessity seems to have been regarded as sufficient to prevent his recovering damages. But the preferable view would seem to be that, in view of the normal requirements of railway work and the universal practice of railway employees, the inference of negligence should not be drawn, as matter of law, unless there is proof of some aggravating circumstance which rendered the action of the servant especially imprudent": See notes to this section.

In *Kansas City So. R. Co.* v. *Billingslea,* 116 Fed. 335 (54 C. C. A. 109), it was held that contributory negligence could not be predicated upon the fact that a

switchman mounted a moving train which was being switched in the yards of the company. In any event, however, contributory negligence is not a defense under the Federal employer's liability law and therefore it is necessary in order to support the judgment of nonsuit to hold that the injury was caused entirely by the negligent act of the decedent.

The complaint alleges that at the time of the injury the decedent, Lewis York, was employed as a laborer with duties to help the train crews; that the defendants carelessly and negligently started and put in motion said train before the deceased had boarded it or was given an opportunity to board the same, and that it was then and there started with a jerk and lurch, thereby preventing said decedent from boarding said car or cars in safety; that the defendants were careless, reckless and negligent in operating and running said cars at a high and dangerous rate of speed before allowing the deceased to board the same and thereby preventing him from any reasonable chance he might have had to get on in safety. The evidence tended to show that the decedent at and a short time before the accident was performing his regular duties and tended to support the allegations of the complaint, especially when the circumstances as detailed by the witnesses are considered.

It is stated in part in 3 Labatt's Master & Servant (2 ed.), Section 1111, as follows:

"Negligence in respect to the system upon which the master's business is conducted, is imputable: * * where railway rolling-stock is moved in such a way as to expose employees to unnecessary risk": See, also, note 7 to that section.

Galveston, H. & S. A. R. Co. v. *Sullivan,* 53 Tex. Civ. App. 394 (115 S. W. 615), is a case where a regular

brakeman was sent ahead of a freight train for some distance in order to flag and hold another train until his passed, when it was his duty to board his train. At the time when he attempted to do so it was run at a high rate of speed, more than 12 miles an hour. It was there held that it was the duty of the engineer and conductor in charge of the train to run it at a rate of speed which would enable such brakeman to get on with reasonable safety; that what that rate of speed was and whether the train was run at such speed were questions for the jury; and that the plaintiff did not assume the risk of being injured and was not guilty of contributory negligence in attempting to board the cars under the circumstances. The evidence was much the same in that case as in the one at bar, save that it was necessary for the plaintiff in the present case to prove the circumstances without the decedent. In the Sullivan case it is mentioned that Mr. Chief Justice ROBERTS, in *Texas & Pac. Ry. Co.* v. *Murphy,* 46 Tex. 356, 360 (26 Am. Rep. 272), discussed at length the proposition that it is the province of the jury to determine negligence with respect to rates of speed, and quoted with approval this language:

"It was for the jury to say whether the danger of boarding the train when in motion was so apparent as to make it the duty of the passenger to desist from the attempt": Citing *Johnson* v. *West Chester & P. R. Co.,* 70 Pa. 357.

Houston & T. C. R. Co. v. *Anderson* (Tex. Civ.), 132 S. W. 377, is a case where, without giving the warning required by its rules of intention to move a car, defendant railroad moved a car thereby causing plaintiff, a brakeman, who was on the car discharging his duties and about to climb down therefrom, to fall and be injured. It was held that defendant was liable.

I do not think it should be said as a matter of law that the defendants in the case at bar were exercising reasonable care and were not negligent in starting the cars and moving them at the rate mentioned when the decedent, in the performance of his duty, was attempting to board the same. It seems to me that the question of negligence should have been submitted to the jury.

Rehearing denied March 19, 1918.

PETITION FOR REHEARING.

(171 Pac. 567.)

Mr. J. C. Simmons and *Mr. Sidney S. Johnson,* for the petition.

Mr. Ben C. Day, Mr. William D. Fenton, Mr. Ralph R. Moody, Mr. T. B. Handley and *Mr. John F. Reilley, contra.*

Department 2. MR. JUSTICE MOORE delivered the opinion of the court.

3. In a petition for a rehearing it is contended that from the testimony received it might reasonably have been concluded that the deceased, immediately prior to and at the time he was injured, was performing a service and discharging a duty demanded of him by reason of his employment, and such being the case, an error was committed in not reversing the judgment and remanding the cause for a new trial. All the material allegations of the complaint respecting his duties and the negligence charged will be set forth. That pleading states:

"Plaintiff alleges that on or about the seventeenth day of March, 1915, the decedent, Lewis York, was

employed as a laborer on the defendants' line of road, * * with his duties to help the train crew to make up a train, to cut out cars, and to dump cars, hauling and transporting rocks and like material on, along and upon defendants' said road and roadbed, * * and while said decedent was performing the work, labor and duties as was required of him, he was ordered and commanded and required to assist in cutting out cars from the train in which there were other cars, * * and setting brakes at what is known and called 'Miami Rock Quarry.' * * And while thus commanded to assist the said crew in performing the work for his master, he was then and there, at and along the said train, and the cars thereof, performing those duties commanded of him, and as was required of him, all of which were well known and within the knowledge of the defendants and each of them, and before he had safely boarded said cars, the train was suddenly, violently and recklessly started and was put in motion with a jerk and a lurch by the defendants, their officers, agents and employees, and the said cars striking the said decedent and throwing him under the said train and then and there inflicting mortal wounds resulting in his death.

"Plaintiff alleges that the defendants were and each of them was negligent in the following particulars: First. That defendants and each of them, recklessly, carelessly and negligently failed and refused to provide and maintain the deceased, Lewis York, with a safe and proper place along their railroad and roadbed to do and perform the work and labor he was commanded and required to do, and did then and there furnish and maintain an unsafe and dangerous place and places for the deceased to perform said work in that, there were rocks, holes and ditches alongside of said railroad track and roadbed and at the place and places for switching car and cars in the said rock quarry.

"Second. That defendants and each of them recklessly, carelessly and negligently started and put in motion the said train before the deceased, Lewis York, had given any signal or notice to start the same, it

being then and there the duty of the defendants, agents and employees to not start the said train until signaled so to do by the deceased, Lewis York.

"Third. That defendants and each of them recklessly, carelessly and negligently started and put in motion said train before the deceased had boarded it or was given any opportunity to board the same, and that the said train was then and there started with a jerk and lurch, thereby preventing the said deceased, Lewis York, from boarding the said car or cars in safety.

"Fourth. That defendants and each of them was careless, reckless and negligent in operating and running said cars at a high and dangerous rate of speed before allowing the deceased, Lewis York, to board the same, and thereby preventing the said Lewis York from any reasonable chance he might have had to get on said car in safety.

"Fifth. That the defendants were negligent in attempting to perform and make a flying-switch at the place, while the same was then and there being done, for the reason that there was a curve and a grade at the said place and that the conditions and manner in performing the same was unsafe and dangerous, which was known or could have been known by the defendants or either of them, their officers, agents and employees, and that said flying-switch used was not a necessity and could have been avoided by the defendants and each of them in carrying out their said business."

The complaint, it will be seen, does not aver that Lewis York was, when he was hurt, or ever had been, employed by the defendants or either of them as a brakeman, and a careful re-examination of the entire testimony fails to show a statement by any witness that the deceased had ever performed or discharged any duty of that kind.

It will be remembered that the second ground of negligence charges that it was incumbent upon the defendants, their agents, etc., not to start the train until

signaled so to do by the deceased, thereby impliedly averring that he supervised or controlled in some manner the movement of the cars. Not a word of testimony to that effect or tending in any manner to substantiate such allegation can be found in the transcript.

It nowhere appears from an inspection of the record before us that it was incumbent upon the deceased to board the train, or that the performance of any duty whatever was required of him in preparing the cars to make a flying-switch, except so far as such service might possibly be inferred from the testimony of George Krumlauf, who stated upon oath at the trial that he saw Mr. York, just prior to the time of the accident, releasing the air from a cylinder beneath a car near the engine.

No testimony was received tending to show that it was at all dangerous for a person to pass over the decks of the flat-cars when they were in motion, or that Mr. York was directed or even expected to set or handle the brakes on the rear or any other car of that part of the train.

The evidence shows that from the trestle, upon which the caboose and two box-cars were left when the train was uncoupled, to the switch was about 400 feet, and from that point to the rock quarry about 600 feet farther. Why Mr. York attempted to board the moving cars which were to be taken only such a short distance and left, is a matter of conjecture so far as disclosed by any testimony. In the absence of such showing tending to prove any allegation of the complaint, we are compelled to adhere to the former opinion. The petition for a rehearing is therefore denied.

Affirmed. Rehearing Denied.

McBride, C. J., and McCamant, J., concur.

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APPEAL AND ERROR.

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1. In such action, the admission of testimony of the servant's wife as to what occurred between her and the doctor's wife when the servant's wife inquired for the doctor at the family residence, if erroneous, was harmless. (Crites v. Willamette Val. Lum. Co., 10.)

Appeal and Error—Reversal—Effect on Acts of Receiver.

2. Where petition for hotel receiver's appointment was included in complaint for accounting, and the allegations, if true, were sufficient to justify his appointment, which was made with notice and after defendants had answered, a subsequent holding on appeal that the trial court's action was erroneous, with direction that the receiver be removed, did not declare the appointment void, nor was it such in fact, so that the receiver was in no sense a trespasser. (Henderson v. Tillamook Hotel Co., 74.)

Appeal and Error—Right of Appeal—Small Claims Actions.

3. Since Laws of 1913, page 732, providing for District Courts, and Laws of 1915, page 517, providing for a "small claims department" in such courts, make no provision for appeal in such small claims actions beyond the Circuit Court, no appeal lies to the Supreme Court, the right of appeal being purely statutory. (Doane v. Stein, 97.)

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4. Under Section 3, Article VII, of the Constitution, as to disposition of case on appeal, in action for breach of contract, a portion of verdict for plaintiff which was based on evidence admitted under an erroneous theory of measure of damages would, on appeal, be eliminated from the judgment for want of competent evidence to support it, and judgment reversed and cause remanded, with directions to enter judgment for plaintiffs for the balance of the verdict. (Stillwell v. Hill, 112.)

Appeal and Error—Record—Bill of Exceptions—Necessity.

5. Where a judgment taxing costs was without findings to support it, the error was apparent on the face of the record and reviewable without a bill of exceptions under Section 172, L. O. L., providing that no exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court. (School Dist. No. 30 v. Alameda Constr. Co., 132.)

Appeal and Error—Denial of Nonsuit—Review.

6. On assignments of error directed wholly to denial of defendant's motions for nonsuit and directed verdict, the only question is whether, viewing the evidence in the light most favorable to plaintiff, it warranted the judgment. (Morata v. Oregon-Wash. R. & N. Co., 219.)

Appeal and Error—Stay—Jurisdiction of Trial Court—Sale of Perishable Property.

7. Notwithstanding appeal, with stay, the trial court has jurisdiction to order sale of property under attachment in the action as perishable property; Section 552, L. O. L., authorizing it, with provision that the proceeds shall be deposited to abide the decision on appeal, if perishable property has been seized to satisfy or secure the judgment. (Bank of Kenton v. Preble, 230.)

Appeal and Error—Review—Questions of Fact.

8. Under Article VII, Section 3, of the Constitution, providing that in actions at law no fact tried by a jury shall be otherwise re-examined in any court, unless the court can affirmatively say there is no evidence to support the verdict, and Section 159, L. O. L., providing that the finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reasons, the Supreme Court has no authority to weigh conflicting evidence in an action at law, and a verdict, or the findings of the court in the absence of a jury, are conclusive, if there is any evidence to sustain them. (Bank of Kenton v. Preble, 230.)

Appeal and Error—Effect of Abandoning Appeal.

9. When a party perfects an appeal and then abandons it, his right of appeal is exhausted; the power over the subject is *functus officio*, and cannot be exercised the second time. (Hill v. Lewis, 239.)

Appeal and Error—Harmless Error—Judgment.

10. Where lack of entry of judgment in lower court was not discovered until after appeal was decided and mandate of appellate court was entered in journal of lower court, the unsuccessful appellants in the first appeal could not, on second appeal, object that the lower court was without power to set aside its order entering the mandate of the appellate court and to incorporate a new order to that effect in its *nunc pro tunc* judgment entry; such action working no injury to appellants, as they admitted liability for costs on prior appeal, and were called on to make but one payment thereof. (City of Portland v. Blue, 271.)

Appeal and Error—Objection Below—Apportionment of Costs.

11. In sewer construction reassessment proceedings under the Portland charter, the objection could not be first raised on appeal to the

Supreme Court that the Circuit Court erred in giving a joint and several judgment against all the defendants for Circuit Court costs instead of apportioning these costs between the defendants under Portland City Charter, § 402, as to costs in Circuit Court. (City of Portland v. Blue, 271.)

Appeal and Error—Presumptions.

12. In the absence of bill of exceptions containing the testimony, the court on appeal is bound to assume that a finding is supported by competent proofs. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Appeal and Error — Burden to Show Prejudice — Exclusion of Evidence.

13. The presumption being that there was no error when plaintiff's testimony was excluded, the burden was on plaintiff to show that such testimony was admissible, and that its exclusion was prejudicial, in order to work reversal, in view of Section 556, L. O. L., permitting reversal only for errors substantially affecting the rights of the appellant. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Appeal and Error — Presumptions — Recital — Certificate of Offer of Proof.

14. The certification of a bill of exceptions, which recited an offer of proof, did not raise the presumption that the witnesses offered were present and the evidence was properly offered, or import waiver by the trial court of the calling of witnesses. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Appeal and Error—Appealable Orders.

15. Where, after divorce suit had been commenced in one Circuit Court by the husband by filing complaint and issuing summons, the wife commenced suit in another Circuit Court, an order of the latter court overruling demurrer and an order allowing suit money and alimony if void for want of jurisdiction were final and appealable. (Matlock v. Matlock, 307.)

Appeal and Error—Proceedings to Transfer Cause—Notice of Appeal—Identification of Judgment.

16. A notice of appeal describing the judgment appealed from by reference to the title and date of entry, if insufficient to identify the judgment, may be read in connection with the undertaking on appeal, including in its description of the judgment the statement of the amount for which it is entered, and, when so read, sufficiently identifies the decision to confer jurisdiction on the Supreme Court by the filing of the transcript. (Meridianal Company v. Bourne, 324.)

Appeal and Error—Scope of Review—Absence of Bill of Exceptions.

17. Absence of bill of exceptions precludes consideration of the testimony and of rulings on the admission or rejection of evidence, and the court can consider only whether the complaint shows a cause of action and the findings justify the judgment. (Meridianal Company v. Bourne, 324.)

Appeal and Error—Scope of Review—Absence of Bill of Exceptions.

18. In the absence of bill of exceptions, the court cannot consider depositions accompanying the transcript. (Meridianal Company v. Bourne, 324.)

Appeal and Error—Matters Reviewable—Instructions—Exceptions.

19. A general exception is sufficient to reserve a contention that an instruction is misleading as applied to the facts proved by the evidence. (Provo v. Spokane, P. & S. Ry. Co., 467.)

Appeal and Error—Curing of Error—Evidence—Bill of Exceptions.

20. Where bill of exceptions does not contain all the evidence, but "is certified to contain * * evidence necessary for the presentation of the exceptions," and it affirmatively appears that there is error, the presumption is that the error was not cured, and was harmful. (Provo v. Spokane, P. & S. Ry. Co., 467.)

Appeal and Error—Review—Questions Presented.

21. While under Section 548, L. O. L., an order setting aside judgment is deemed a final judgment for the purpose of review, yet as there is no determination on the merits, the propriety of a ruling that counterclaims and defenses interposed by certain of the defendants were sufficient cannot be reviewed. (Archambeau v. Edmunson, 476.)

Appeal and Error—Judgment on Demurrer—Acceptance of Facts in Complaint as True.

22. For purposes of plaintiff's appeal from judgment rendered on demurrer to the complaint, the statement of facts found in the complaint must be accepted as true. (The Oregon Home Builders v. Crowley, 517.)

Appeal and Error—Directing Judgment.

23. The case being one in which it can be determined from the record what judgment should have been entered, the appellate court will, under Article VII, Section 3, of the Constitution, direct the entry thereof. (Learned v. Holbrook, 576.)

Appeal and Error—Absence of Bill of Exception—Extent of Review.

24. No bill of exceptions accompanying transcript and defendant's assignments being that court erred in overruling demurrer to complaint and in refusing and in giving instructions, the only matter which will be considered on appeal is the ruling upon demurrer; the objection that a complaint does not state facts sufficient to constitute a cause of action never being waived under Section 72, L. O. L. (Pratt v. Gibson, 609.)

Appeal and Error—Exclusion of Evidence—Invited Error.

25. Where tendered evidence was excluded upon solicitation of defendant, defendant cannot complain. (City of Seaside v. Oregon Surety & Casualty Co., 624.)

Appeal and Error—Review—Findings.

26. Findings of fact by the trial court in a case tried without a jury are conclusive in so far as they are supported by evidence. (Ditchburn v. Caples, 646.)

Appeal and Error—Grantees in Deed—Presumption.

27. Where sheriff's return upon order to bring in new parties showed that E. had succeeded to rights of M., it will be presumed that E.'s wife, who joined him in demurring to complaint, and who is named as a proper party in assignments of error, is one of grantees in deed executed by M. (Thomas v. Thruston, 650.)

Appeal and Error—Notice of Appeal—Adverse Parties.

28. As those brought in by due service of court's order and whose demurrers to complaint were sustained were adverse parties as to defendant, whose motion to amend his answer so as to make demurrants defendants in the suit was denied, the Supreme Court acquired no jurisdiction of defendant's appeal from decree after trial where no notice of appeal was served on demurrants in view of Section 41, L. O. L., providing that when a complete determination of a controversy cannot be had without the presence of other parties, the court shall cause them to be brought in, and Section 558, providing that the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment or decree appealed from. (Thomas v. Thruston, 650.)

Appeal and Error—Necessity of Remand—Receiver's Accounts.

29. In suit to foreclose mortgages, the court, pursuant to their stipulations, having appointed a receiver to take charge of and collect the rents and profits of the property, and such receiver having collected the rents and paid current expenses, it will be necessary for the trial court to ascertain the amount the receiver has to apply on plaintiff's mortgages, and the suit will be remanded for final decree after making deduction of the amount available. (Alliance Trust Co. v. Hubbard, 669.)

See Costs, 1.
See Criminal Law, 2.
See Equity, 7.
See Judgment, 11.

ASSESSMENT.

See Municipal Corporations, 17, 23–26.
See Trial, 2.

City Treasurer's Sale on Reassessment for Public Improvement.

See Municipal Corporations, 3.

Assessment for Public Improvement.

See Municipal Corporations, 4–7.

Correction of Assessment.

See Taxation, 1–4.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See Corporations, 1–3.

ASSIGNMENTS.

Assignments—Broker's Contract—Right to Commission.

1. Mere fact that a broker, having a contract for commissions to be paid out of a certain fund, to be collected from the sale, assigned his contract, did not give the assignee a right to his commission at all events; but he was entitled only to a commission on the terms on which the broker would have been entitled thereto. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

ASSUMPTION OF RISK.

See Master and Servant, 11.

ASTORIA, CHARTER OF.

See City of Astoria v. Malone, 88.

ATTACHMENT.

Attachment—Necessity of Compliance With Statute.

1. Attachment proceedings are statutory, and the substantial requirements of the statute must be complied with. (Murphy v. Bjelik, 329.)

ATTORNEY AND CLIENT.

Attorney and Client—Employment—Evidence—Satisfaction of Judgment.

1. That defendant, sued for money collected by him on a judgment obtained by plaintiff, signed the satisfaction in his name as attorney for plaintiff, is some evidence that plaintiff employed him as attorney in the action in which the judgment was recovered; "attorney," as distinguished from "counsel," having under Sections 1074, 1083, L. O. L., power to satisfy judgment. (Caples v. Ditchburn, 264.)

Attorney and Client — Action for Money Collected — Presumption — Burden of Proof.

2. On evidence that plaintiff owned a judgment and that defendant as attorney collected it, the presumption is that plaintiff owned all the money collected; so that, if defendant would reduce plaintiff's recovery or postpone the right, he must do so by offering evidence, plaintiff not being required to anticipate defenses relied on. (Caples v. Ditchburn, 264.)

Attorney and Client—Action for Money Collected—Demand—Necessity of Proof.

3. The answer in an action against an attorney for money collected claiming part of the money and justifying possession and detention of the remainder, it is unnecessary for plaintiff to give evidence of demand of payment, which it is obvious would have been idle. (Caples v. Ditchburn, 264.)

Attorney and Client—Admissions—Effect.

4. In suit by a railroad against land owners, where the land owners claimed they did not understand the effect of a deed of theirs to the road, but their previous attorney, who acted for them in the transaction, testified unequivocally that they did understand its effect, and their present attorney in court stated that he could not contradict such previous attorney's testimony, and would have to abide by it, the announcement, approved by the court, forever settled the question that the land owners' deed was knowingly executed by them as a substitute for and in lieu of their previous conveyance to the railway. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Attorney and Client—Acting for Different Parties.

5. Where an owner contracted for the erection of a building, and gave mortgages to secure the money, there was no impropriety in her attorney's acting as attorney for the contractors against the bank which advanced the money for construction after his relations with

the owner, as her attorney, had ceased. (Alliance Trust Co. v. Hubbard, 669.)

AUTHORITY.

See Corporations, 1.
See Municipal Corporations, 30.
See Principal and Agent, 1.
See Receivers, 1.

Of Court to Grant a New Trial.

See New Trial, 1.

AUTOMOBILE COLLISION.

See Municipal Corporations, 12.

BANKRUPTCY.

Bankruptcy—Rights of Trustee Against Bankrupt's Surety.

1. Likewise, the contractor's trustee in bankruptcy was postponed to the rights of the surety, since the trustee takes nothing his bankrupt does not take. (Derby v. United States etc. Co., 34.)

Bankruptcy—Burden of Proof—Attack on Accounting by Trustee.

2. If the trustee in bankruptcy of a contractor with the state to install plumbing in buildings, and the bank which lent the contractor money, would overturn the accounting had by the surety for the contractor with the Secretary of State, supported by competent testimony, they must show the account is erroneous, and specify wherein it is at fault. (Derby v. United States etc. Co., 34.)

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

Bills and Notes—Action—Defenses—Want of Consideration—Pleading.

1. The petition, in action on a note, alleging an indebtedness in settlement of which the note was given, and the answer not denying this, but, though alleging want of knowledge of the exact amount of the indebtedness, pleading a setoff, the defense of want of consideration is not available. (Sanford v. Pike, 614.)

Bills and Notes—Consideration—Defenses.

2. In an action on notes given for the purchase price of personal property, it is no defense to show that plaintiff did not own some of the property which he represented was included in the purchase, unless the value of such property be shown, the fact that the assets secured by the purchasers were less than the amount which they paid entitling them to no relief, as they might have made an improvident bargain. (Ditchburn v. Caples, 646.)

Liability of Wife on Note Executed in Her Name by Husband.

See Husband and Wife, 1.

BONA FIDE PURCHASER.

See Sales, 7, 8.

BONDS.

Bonds—Conditions—Breach.

1. Obligation on a bond, conditioned that the obligors build a mill on their property, is matured by their selling their property without constructing the mill. (Learned v. Holbrook, 576.)

See Counties, 1.
See Damages, 8.
See Highways, 6, 7.

Bond of City Treasurer.

See Municipal Corporations, 27–29.

Bond Issue of Irrigation Districts.

See Waters and Watercourses, 1.

BREACH OF CONTRACT.

See Master and Servant, 5, 6.

BROKERS.

Brokers—Right to Commission.

1. As a general rule, a broker is entitled to its commission when it produces a purchaser with whom the seller made a binding contract of sale; but the rule is subject to modification by the contract of the parties. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Brokers—Contracts—Construction.

2. A broker's contract for commissions, to be paid on a basis of 20 per cent of the selling price out of the first moneys collected from the sale of lots, entitling the agents to retain out of each payment collected such amount as was then due and payable, but not otherwise, entitles the broker to commission, not at all events, but only out of a specific fund. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Brokers—Commission—Specific Funds.

3. A promise to pay a broker commission out of a specific fund, to be collected by him, is enforceable only on allegations and proof that the fund named is adequate for the payment demanded. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Brokers—Actions—Evidence—Admissibility.

4. In a broker's action for commission, to which under his contract he was entitled only if the sale was completed and the price paid, it was competent for the defendant to prove that it canceled contracts held by purchasers who were unable to pay. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Brokers—Actions—Findings—Sufficiency.

5. Where the court found that the broker had received all commissions to which he was entitled, except a certain sum, that all the cancellations of contracts had been necessary, that the expense thereof was a certain sum to be borne under the contract proportionately by the broker and defendant, the findings supported a judgment in

defendant's favor for the difference between the commission due and the balance due defendant because of the cancellations, and failure to make additional findings was not error. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Brokers—Knowledge of Agent—Notice to Principal.

6. That a broker assisting plaintiff in negotiating an exchange was also the agent of defendant could not of itself warrant the refusal of an instruction that notice to the broker was notice to plaintiff. (Ward v. Jenson, 314.)

Brokers—Contract of Employment—Statute of Frauds.

7. Letter from defendant, in reply to some letter, stating that if plaintiff has a customer for defendant's land, he will make a price of $15 an acre net to defendant, reply from plaintiff, stating it will endeavor to make as much profit as possible, and will expect defendant to protect it in the matter of difference between net price and the quotation to be made to purchaser, and letters from defendant agreeing to protect plaintiff in such matter, are insufficient as a contract of employment of broker to sell real estate, within Section 808, L. O. L., declaring such a contract void, unless there be a written memorandum thereof, subscribed by the parties, expressing the consideration, and excluding all evidence of the agreement other than the writing or secondary evidence of its contents; there being no words of employment, and it being necessary that the papers establish the hiring and the consideration for it. (Great Western Land Co. v. Waite, 488.)

Brokers—Contract of Employment—Statute of Frauds.

8. Correspondence *held* not to show a contract of employment of plaintiff by defendant as his broker to sell land, within Section 808, L. O. L., requiring a written memorandum of such contract, expressing the consideration. (Great Western Land Co. v. Waite, 488.)

Brokers—Employment of Broker—Writing Stating Amount of Commission—Statute of Frauds.

9. By the statute of frauds, Section 808, subdivision 8, L. O. L., rendering void an agreement authorizing or employing an agent or broker to sell or purchase realty for compensation or a commission, the writing employing a broker must state the amount of the commission agreed to be paid to him, that being a requirement predicated on the fact that the amount of the commission agreed upon constitutes a term of the contract. (The Oregon Home Builders v. Crowley, 517.)

Brokers—Contract of Employment of Broker to Exchange Realty—Writing Expressing Consideration.

10. The writing signed by an owner of property employing a corporation to procure its exchange, reading that he agreed to pay the corporation in cash as a commission for its services 2½ per cent on the selling price of the price for which the property was sold or at which it was exchanged, satisfied the statute of frauds, Section 808, subdivision 8, L. O. L., as to agreements employing agents or brokers to sell or purchase realty, by expressing the consideration. (The Oregon Home Builders v. Crowley, 517.)

Brokers—Contract—Performance of Action on Which Promise was Conditioned—Conversion of Offer Into a Binding Agreement.

11. Where a corporate realty broker, employed to effect an exchange of property, did so, thus performing the act on which its em-

ployer's promise to pay commission was conditioned, it furnished the consideration necessary to convert its employer's promise to pay commission into an obligation to pay it, thus transforming into a binding agreement, satisfying the statute of frauds, Section 808, subdivision 8, L. O. L., its employer's written offer to pay commission for services in effecting exchange. (The Oregon Home Builders v. Crowley, 517.)

Brokers—Contract—Statute of Frauds—Consideration.

12. Under Section 808, subdivision 8, L. O. L., requiring broker's contract to buy or sell to state the consideration, while the consideration must be expressed, it need not be formally and precisely expressed, and it is sufficiently expressed if it appears by necessary inference. (The Oregon Home Builders v. Crowley, 517.)

Brokers—Statute of Frauds—Written Offer—Parol Acceptance.

13. A written offer may constitute a sufficient memorandum of the broker's written contract required by Section 808, subdivision 8, L. O. L., to charge the party making it, if it is later accepted by parol. (The Oregon Home Builders v. Crowley, 517.)

Employment of Broker.

See Contracts, 1, 2.
See Evidence, 11.

BUDGET LAW.

Effect to Comply With the Budget Law.

See Highways, 8.

BULK SALES.

See Election of Remedies, 2.
See Fraudulent Conveyances, 1–3.

BURDEN OF PROOF.

See Appeal and Error, 13, 14.
See Attorney and Client, 2, 3.
See Bankruptcy, 2.
See Corporations, 3.
See Damages, 6.
See Highways, 1.
See Quieting Title, 2.
See Sales, 6.
See Taxation, 2.
See Vendor and Purchaser, 3.
See Wills, 1.

CARRIERS.

Carriers—Carriage of Passengers—Injuries to Passengers—Negligence.

1. Where a door leading from the main compartment of the street-car to the front platform and designed to swing either way for the ingress or egress of passengers worked so hard that a passenger who was directed by the motorman to push on the door was, when she finally forced the door open, carried by the force of her push and the sudden opening out into the platform and down into the highway where she fell, the street railway company cannot defeat recovery on the ground that there was no actionable negligence, for the door, in the very nature of things, was defective. (Adams v. Portland Ry. L. & P. Co., 602.)

Carriers — Carriage of Passengers — Duty to Assist Passenger in Alighting.

2. While a carrier is ordinarily under no duty to assist a passenger in alighting, it is the duty of the carrier's servants to assist a passenger where there is some unusual danger or difficulty arising from the means afforded for alighting. (Adams v. Portland Ry. L. & P. Co., 602.)

Carriers—Carriage of Passengers—Actions—Jury Question.

3. In an action for injury received by plaintiff when she fell as the result of the sudden opening of a door on street-car furnished for egress against which she was told to push, question whether carrier's servants in charge of the car were negligent in failing to open the door, *held*, under the evidence, for the jury. (Adams v. Portland Ry. L. & P. Co., 602.)

See Trial, 12.

CASES IN THE OREGON REPORTS.

Applied, Approved, Cited, Distinguished, Followed and Overruled in This Volume.

See Table in Front of this Volume.

CHARTERS OF CITIES.

Cited and Construed in this Volume.

CITY OF ASTORIA.

See City of Astoria v. Malone, 88.

CITY OF EUGENE.

See City of Eugene v. Garrett, 435.

CITY OF GRANTS PASS.

See City of Grants Pass v. Rogue River Pub. Serv. Corp., 637.

CITY OF PORTLAND.

See Crowe v. Albee, 148.
See Elliott v. City of Portland, 47.
See City of Portland v. Blue, 271.
See Smith v. Meier & Frank Inv. Co., 683.
See Wilson v. City of Portland, 507.

CITY OF SEASIDE.

See Grimes v. City of Seaside, 256.

CHATTEL MORTGAGES.

Chattel Mortgages—Execution—Priority—Statutes.

1. Section 7407, L. O. L., having been enacted after Section 799, prevails in case of any repugnancy as regards priority between unrecorded chattel mortgage, without delivery and change of possession, and subsequently levied executions. (Pattee v. Harbaugh, 612.)

Chattel Mortgages—Priority—Execution—Statutes.

2. Execution creditors being classified by Sections 233, 301, L. O. L., as purchasers in good faith, as against third persons, are

protected by Section 7407, subsequently enacted, declaring unrecorded chattel mortgages, without delivery and change of possession of property, void as against subsequent purchasers in good faith. (Pattee v. Harbaugh, 612.)

CIRCUIT COURTS.

See Courts, 3, 4.

CITATION.

Order for Publication on Sale of Land.

See Executors and Administrators, 1.

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charter of Cities.

CITY ORDINANCES.

See Municipal Corporations.

CIVIL SERVICE BOARD.

See Municipal Corporations, 9–11.

COMMISSION.

See Assignments, 1.
See Brokers, 1–5, 9–11.
See Contracts, 1, 2.

COMMON LAW.

See Statutes, 3.

CONCLUSIVENESS.

See Equity, 1.
See Judgment, 1, 2, 4, 8, 10.

CONDITIONAL SALES.

See Sales, 4–8.

CONDITIONS.

When Condition of Bond to Build Mill is Matured.

See Bonds, 1.

CONSIDERATION.

See Bills and Notes, 1, 2.
See Brokers, 10, 11, 12.
See Contracts, 1.
See Tenancy in Common, 1, 2.

CONSTITUTIONAL LAW.

Constitutional Law—Ordinances—"Conspiracy to Injure Trade, Business or Commerce"—"Strikes"—"Boycott"—"Picketing."

1. A municipal ordinance defined conspiracies to injure trade, business or commerce as any combination or agreement between two or more persons not to buy from or sell to, or have dealings with any

person or persons, or to induce or attempt to induce other persons not to buy from or have dealings with any person or persons, etc., for the purpose or with the intent to compel or force employment or discharge from his employment. The ordinance further declared that if any person alone or in company with others shall carry or display, or cause to be carried or displayed, print or circulate, or cause to be printed or circulated, any banner, sign, etc., which by its terms directly or indirectly induces or attempts to induce others not to buy from or sell to or have dealings with any designated person, or shall loiter or parade back and forth, or cause any person or persons to loiter or parade back and forth, in front of, or in the vicinity of, any store, etc., such conduct shall be *prima facie* evidence of a conspiracy to injure the trade or business of the person or persons referred to by the banner, etc., or whose property is thus patrolled. A "strike" is defined as the act of a body of workmen employed by the same master in stopping work all together at a prearranged time, and refusing to continue until some concession is granted by the employer, while a "boycott" is defined as a combination to cause a loss to one person by coercing others against their will to withdraw from him their business intercourse, by threats that unless others do so, the combination will cause similar loss to them. *Held*, that the ordinance, even though valid as applied to "picketing," which is defined as posting members of a trade union on a strike at all the approaches to works for the purpose of observing or reporting the workmen going to or coming from the works, and of using such influence as may be in their power to prevent the workmen from accepting work there, it is invalid in depriving workmen of their right to strike *en masse;* that right having been recognized for many years. (Hall v. Johnson, 21.)

Constitutional Law—Homestead—Grant of Special Privileges—Homestead Law.

2. The homestead statute (Sections 221, 222) is not violative of Article I, Section 20, of the Constitution, as granting privileges or immunities to one citizen which under the same terms would not belong to all, because, as construed, a debtor claiming homestead living in an addition where city lots are platted 25 by 100 feet, and his neighbor, just over the line, residing in an addition where the lots are platted 100 by 100 feet, would be on an unequal footing, in that each would be entitled to a homestead exemption of one lot irrespective of value. (Watson v. Hurlburt, 297.)

Constitutional Law—Obligation of Contracts—Amendment of Constitution—Charter of Corporation.

3. Stock in a bank subscribed for when Article XI, Section 3, of the Constitution, provided, as it did when the corporation was created, that stockholders should be liable for the corporation's indebtedness only to the amount of their unpaid subscription, was not subject to the subsequent amendment (see Laws 1913, p. 8) imposing a double liability on stockholders in a bank. (First Nat. Bank v. Multnomah State Bank, 423.)

Constitutional Law—Obligation of Contracts—Corporations—Liability of Stock.

4. A bank having been incorporated when Article XI, Section 3, of the Constitution, provided that stockholders should be liable for the corporation's indebtedness only to the extent of their unpaid sub-

scription, holders of stock subscribed for after the going into effect of the amendment of Section 4585, L. O. L., by Laws of 1911, page 243, increasing the liability, was not subject thereto; the charter controlling. (First Nat. Bank v. Multnomah State Bank, 423.)

Constitutional Law—Witnesses—Reversals and Annuities.

5. Section 3145, L. O. L., entitling witnesses to mileage at the rate of 10 cents a mile except in counties of 50,000 inhabitants, where the rate is fixed at 5 cents, applies to all citizens, and is not inimical to Article I, Section 20, of the Constitution, providing that no law shall be passed granting to any citizen privileges of annuities, which upon the same terms shall not equally belong to all citizens. (City of Seaside v. Oregon Surety & Casualty Co., 624.)

See Appeal and Error, 4.
See Municipal Corporations, 31.
See Statutes, 2.

CONSTITUTION OF OREGON.

Cited and Construed in this Volume.

See Table in Front of this Volume.

CONSTRUCTION.

See Brokers, 2.
See Homestead, 3.

CONTINUANCE.

Continuance—Discretion—Exercise.

1. On application for a continuance, trial court should exercise its judicial discretion according to fixed legal principles in order to promote substantial justice. (Elliott v. Lawson, 450.)

Continuance—Denial—Propriety.

2. A member of the National Guard who was in federal service was granted a furlough to return to attend to some of his private business. While traveling in an automobile to connect with the only train that day leaving the locality and by which he could return to his regiment within the time specified by his furlough, he was served with summons and complaint. He had no more than a half hour in which to look up his attorney and advise him of the situation, which he did. Such guardsman was unable to advise his attorney of the circumstances, and his testimony was necessary to explain books of account necessary to his defense. *Held* that, as it is the policy of the law to give a party to an action his day in court or a sufficient opportunity to make any defense claimed by him, the denial of an application for a continuance on behalf of such national guardsman to enable him to make his defense, it appearing that trial was had approximately a month after service of process, was an abuse of discretion, this being particularly true in view of the policy of the law as shown by Laws of 1917, page 515, relating to the suits to foreclose mortgages, and levy execution of judgment upon and against lands of soldiers and sailors in actual service. (Elliott v. Lawson, 450.)

CONTRACTS.

Contracts—Consideration—Contract to Pay Commission.

1. The services rendered by a corporation employed to procure an exchange of realty were the consideration for its employer's

promise to pay commission, because the services to be rendered furnished the only inducement for the promise. (The Oregon Home Builders v. Crowley, 517.)

Contracts—Consideration—Broker's Contract.

2. An owner's promise in his written offer to pay a commission for the sale or exchange of realty was designed to procure a broker's services, such services to be rendered are taken as the consideration for the promise. (The Oregon Home Builders v. Crowley, 517.)

Contracts—Performance—"Impossible."

3. Contract of parties to build a mill on their property is not "impossible" of performance, so as to excuse nonperformance, because the mill could not be profitably operated without vacation of streets; impossible not meaning impracticable. (Learned v. Holbrook, 576.)

Contracts—Possibility of Performance—Vacation of Street—Evidence.

4. As showing willingness of a city council to vacate streets for industrial plants, an ordinance for such purpose, though not complying with statutory requirements, is admissible. (Learned v. Holbrook, 576.)

See Assignments, 1.
See Brokers, 2, 9–13.
See Constitutional Law, 3, 4.
See Corporations, 9.
See Counties, 1.
See Damages, 7.
See Evidence, 2.
See Highways, 6, 7.
See Landlord and Tenant, 1.
See Principal and Agent, 2.
See Schools and School Districts, 1–4.
See States, 1–3.
See Statute of Frauds, 1, 2.
See Subrogation, 1, 2.
See Vendor and Purchaser, 1–5.

Employer's Contract to Furnish Medical Services.

See Master and Servant, 1–6.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 9, 10.

CORPORATIONS.

Corporations—Assignments for Creditors—Officer's Lack of Authority to Execute.

1. Where a corporation never authorized its president and secretary to execute an assignment of assets for the benefit of all creditors, the document executed by them is of no force and effect. (Bell & Co. v. Vogt, 102.)

Corporations—Assignments for Creditors—Pleading—Admission.

2. In suit wherein an accounting was sought from the alleged trustee of an insolvent corporation, a paragraph of the answers, reading that on or about a certain date the company was indebted to various

creditors in various sums of money, and orally requested defendant, through its officers, to receive any moneys that might be collected by the collector for the corporation, and to pay them out to various creditors, which defendant orally agreed to do, did not admit an assignment for the benefit of all creditors or any particular creditor, and contained nothing whereon to base claim against defendant, alleged trustee. (Bell & Co. v. Vogt, 102.)

Corporations—Assignments for Creditors—Suit for Accounting from Alleged Trustee—Burden of Plaintiff.

3. To give a creditor seeking an accounting from the alleged trustee of an insolvent corporation any standing in court in such a suit, the creditor must establish a valid assignment for creditors by the corporation, in which the creditor has a beneficial interest. (Bell & Co. v. Vogt, 102.)

Corporations—Creditors' Suit—Avoiding Mortgage—Fraud—Evidence.

4. Evidence, in suit by nonsecured creditors of a corporation to defeat or reduce the amount of its mortgage, *held* to show the indebtedness represented by the mortgage and secured notes to be free from fraud. (Brayton & Lawbaugh v. Monarch Lum. Co., 365.)

Corporations—Creditors' Suit—Avoiding Deed.

5. Conveyances by an insolvent corporation of all its assets to another corporation without property, consideration for which failed, and conveyances of such property by the second corporation without authorization to the mortgagees of the first corporation, knowing of the circumstances, are properly annulled at suit of the creditors of the first corporation. (Brayton & Lawbaugh v. Monarch Lum. Co., 365.)

Corporations—Pledge of Stock—Protection by Pledgee.

6. The pledgee of stock may maintain suit to protect his rights in and to it where the pledgor might have done so. (First Nat. Bank v. Multnomah State Bank, 423.)

Corporations—Guaranty of Lease of Customer.

7. A brewing corporation can legally guarantee the performance of any condition in a lease to a saloon-keeper who stipulates exclusively to sell such corporation's beer. (Depot Realty Syndicate v. Enterprise Brewing Co., 560.)

Corporations — Acts of Officers Beyond Authority — Ratification — Silence.

8. Where an agent for a brewing corporation guarantees payment of rent by a saloon-keeper without authority, but the landlord writes the officers of the corporation as to the fact, asking if it is all right, silence on the part of the brewing company renders it liable for subsequently accruing rent, but not for prior rent, it being the duty of the principal to immediately deny the authority of the agent if it desires not to be bound. (Depot Realty Syndicate v. Enterprise Brewing Co., 560.)

Corporations—Powers of Managing Officers—Contracts of Guaranty.

9. The managing officers of a brewing corporation have the power to authorize an agent to guarantee the conditions in leases to saloon-

keepers, or to ratify such a guaranty, without a resolution of the directors; such officers of a corporation having power coextensive with those of the principal, except as to matters over which the stockholders alone have control, and power to adopt any reasonable means that might tend to advance the interests of the corporation. (Depot Realty Syndicate v. Enterprise Brewing Co., 560.)

Corporations — Guaranty — Authority of Agent — Sufficiency of Evidence.

10. Evidence *held* insufficient to support a finding that a state agent for a brewing corporation had authority to guarantee payment of rent by a saloon-keeper to a landlord. (Depot Realty Syndicate v. Enterprise Brewing Co., 560.)

See Constitutional Law, 4.

COSTS.

Costs—On Appeal—Reversal as to Costs.

1. Although the judgment for costs was reversed, appellant was not entitled to costs in the Supreme Court, where the principal judgment was affirmed; the procedure for taxation of costs provided by Sections 569, 570, and 581, L. O. L., although ancillary to the principal matter in dispute, being in practice entirely separate from the latter. (School Dist. No. 30 v. Alameda Constr. Co., 132.)

Costs—Disbursements of First Trial.

2. Where defendant secured an erroneous decision on the first trial, which decision was set aside on plaintiff's motion, plaintiff, who secured judgment on the second trial, was entitled to disbursements incurred at the first trial under Section 566, L. O. L., providing that party entitled to costs shall have allowed all necessary disbursements. (City of Seaside v. Oregon Surety & Casualty Co., 624.)

See Appeal and Error, 11.

COUNTIES.

Counties—Contract for Work—Bond—Statute.

1. Section 6266, L. O. L., requiring anyone contracting with the state, a municipality, county, or school district for prosecution of any work to give the usual penal bond, with the additional obligations that he make payments to all supplying him labor or material for any prosecution of the work, is not limited to what is incorporated into the work, but concerns every approximate relation of the contractor to that which he has contracted to do. (Multnomah County v. United States F. & G. Co., 198.)

Liability of County for Personal Injury.

See Highways, 1–5.

COUNTY COURT.

Delegation of Power to Improve a County Road.

See Highways, 9.

COUNTY ROADS.

See Municipal Corporations, 32.

COURTS.

Courts—Orders Nunc Pro Tunc.

1. An order for a *nunc pro tunc* entry of findings not stating what conclusion of fact or law had been theretofore made is insufficient, and such entry must neither add to nor take from the original. (Crowe v. Albee, 148.)

Courts—Jurisdiction—"Proceeding in Rem"—"Subject Matter."

2. Under Section 63, L. O. L., providing that a court shall be deemed to have acquired jurisdiction from the time of the service of the summons, Section 51 providing that actions at law shall be commenced by filing a complaint with the clerk of the court, Section 395 providing in effect that Section 51 applies to commencement of suits in equity, Section 526 providing that an action or suit is deemed to be pending from the commencement thereof until it is finally determined on appeal or until the expiration of the period allowed to take an appeal, and Section 396 providing that any suit for a dissolution of the marriage contract may be commenced and tried in any part of the state in which either party to the suit resides, where both suits were for divorce, involving the status of the parties, the Circuit Court of M. County could not, after the husband had commenced suit in the Circuit Court of another county by filing a complaint and issuing summons, acquire jurisdiction over the subject matter of the suit and of the person of the husband, although the summons was first served in the suit by the wife in M. County; the rule being that, when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues subject only to appellate authority until the matter is finally disposed of, a divorce proceeding in so far as it fixes the status of the parties being a "proceeding *in rem*," and "subject matter" in its broadest sense meaning object, the thing in dispute, but in a legal sense, when reference is made to matters of jurisdiction, meaning the nature of the case and the relief sought. (Matlock v. Matlock, 307.)

Courts—Circuit Courts—Presumption of Jurisdiction.

3. The Circuit Court being a Superior Court of record, when it produces a judgment relating to a matter within the general scope of its powers, such judgment generally proves itself, and, in the absence of affirmative evidence to the contrary, jurisdiction will usually be presumed. (Murphy v. Bjelik, 329.)

Courts—Circuit Court—Jurisdiction.

4. If in rendering judgment the Circuit Court was not proceeding according to common law, as where exercising special powers not brought into action according to common law, jurisdiction will not be presumed from the fact of judgment, but must be made affirmatively to appear on the face of the record. (Murphy v. Bjelik, 329.)

Small Claims Department in District Courts.

See Appeal and Error, 3.

Jurisdiction of County Court Over County Roads.

See Municipal Corporations, 32.

Approval of Bond Issue of Irrigation Districts.

See Waters and Watercourses, 1.

COVENANTS.

Running With the Land.

See Railroads, 1, 2.

CREDITORS' SUIT.

See Corporations, 4, 5.

CRIMINAL LAW.

Criminal Law—Prohibition—Nature of Acts Which can be Prohibited.

1. It is fundamentally true that whatever may be enjoined by a court of equity may by legislation be declared *malum prohibitum.* (Hall v. Johnson, 21.)

Criminal Law—Appeal—Formal Defects.

2. The contention that the judgment of conviction should be affirmed, because defendant's counsel moved for a directed verdict instead of a verdict of not guilty, is without merit. (City of Astoria v. Malone, 88.)

CUSTOM AND USAGE.

See Master and Servant, 11.

DAMAGES.

Damages—Duty to Reduce.

1. The law imposes upon a party injured by another's breach of contract the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible, and if by his negligence or willfulness he allows the damage to be unnecessarily enhanced, the increased loss, when it was avoidable by the performance of his duty, falls upon him. (Stillwell v. Hill, 112.)

Damages—Personal Injuries—Aggravation of Old Injuries.

2. In an action for injuries in collision by defendants' automobile with plaintiff's sled, the court properly refused to instruct at defendant's request that the jury could not allow plaintiff anything if they should believe from the evidence in the case that his old ailments or injuries were aggravated or made worse because of the accident. (Williams v. Lombard, 245.)

Damages—Pleading.

3. Plaintiff cannot recover for an aggravation of prior injuries, unless such conditions are pleaded. (Williams v. Lombard, 245.)

Damages—Liquidated Damages or Penalty.

4. A bond running to owners of property in the neighborhood, conditioned to pay a certain sum as liquidated damages for failure of obligors to build a mill on their property, the damages being difficult or impossible of proof and measurement, is one for liquidated damages. (Learned v. Holbrook, 576.)

Damages—Liquidated Damages—Reasonableness.

5. The reasonableness of damages liquidated by agreement is to be determined by the conditions in the minds of the parties when their agreement was made. (Learned v. Holbrook, 576.)

Damages—Liquidated Damages—Burden of Proof.

6. Parties sued for liquidated damages have the burden of showing that no damages could have flowed from their default in the performance of their agreement. (Learned v. Holbrook, 576.)

Damages—Liquidated Damages—Effect—Agreement.

7. Where the parties by contract stated a reasonable sum as liquidated damages, neither could urge that the damages were greater or less than the amount agreed upon. (Learned v. Holbrook, 576.)

Damages — Municipal Corporations — Lighting Plants — Bonds — Recovery.

8. A municipal corporation authorized by Sections 3211, 3229, L. O. L., to sue and be sued, contract and be contracted with, acquire, hold, possess, dispose of property, and to provide for the lighting of streets, and furnishing the city or town and the inhabitants thereof with gas or other lights as well as to allow the use of streets and alleys of the city to any person or corporation who may desire to establish works for supplying the city and its inhabitants with water, or lights, upon such reasonable terms as the council may prescribe, granted defendant corporation a franchise to erect poles and string wires in the streets of the town, the ordinance requiring defendant to give a bond conditioned that it should have a certain portion of its service in full operation within nine months after the grant of the franchise and should maintain it so as to furnish electricity adequate for light and power purposes. Defendant accepted the terms of the grant and accepted and executed its bond, but failed to erect poles or in any way to comply with the requirement that it should have a certain percentage of its service in full operation within nine months. *Held*, that the municipality might without proof of any special or actual damages recover the full amount of the undertaking. (City of Grants Pass v. Rogue River Pub. Service Corp., 637.)

See Equity, 2.
See Fraud, 2, 11.
See Injunction, 4.
See Sales, 2, 3.
See Trespass, 2.

DEATH.

Action for Death of Servant.

See Master and Servant, 14.

DEDICATION.

Dedication—Abandonment of Part of Street—Right to Open.

1. Where a street was dedicated 90 feet wide, and the city used but 70 feet of the width although it improved the street by grade and macadam, and it was desired that the street be narrowed to 70 feet, which had not been done, as the property owners knew, or by reasonable diligence could have known, they took chances in improving their lots, and the city is not estopped to claim the full width of the street. (City of Eugene v. Garrett, 435.)

DEEDS.

Deeds—Delivery.

1. If the grantor parts with all dominion and control over his deed, reserving no right to recall it or alter its provisions, there is a good delivery. (Dieckman v. Jaegar, 392.)

Deeds—Delivery—Direction to Turn Over to Grantee "In Case of My Death."

2. Where the grantor deposited his deed to the grantee with third persons, directing, "In case of my death you will please deliver the attached deed, from myself to E. D., to E. D.," there was a good delivery, and the grantee on the grantor's death succeeded to so much of the land as the grantor had not conveyed to others, since the words "in case of my death" as used are identical with "after my death." (Dieckman v. Jaeger, 392.)

Deeds—Delivery—Delivery to Third Person.

3. A delivery of a deed to a third person for the grantee is absolute, unless the grantor at the time of making it manifested some intention of retaining control, or there are circumstances showing that the deposit was made subject to recall. (Dieckman v. Jaegar, 392.)

Deeds—Delivery—Question of Fact.

4. Where there is any controversy upon the subject the delivery of a deed or instrument of such nature is a question of fact. (Archambeau v. Edmunson, 476.)

Deeds—Delivery—Right to Question.

5. A judgment creditor of one of two grantors could only question the delivery of the conveyance so far as it involved the interest of his debtor. (Belcher v. La Grande Nat. Bank, 665.)

Deeds—Sufficiency of Delivery—Delivery to Agent of Grantee.

6. Where a deed by S. and B. was delivered to B., as the agent of the grantee, there was a sufficient delivery so far as the interest of S. was concerned. (Belcher v. La Grande Nat. Bank, 665.)

Presumption as to Grantees in Deed.

See Appeal and Error, 27.

Deed Annulled for Fraud.

See Corporations, 5.

Effect of not Recording.

See Judgment, 12, 13.

Deed Given to Secure Loan.

See Mortgages, 1, 2, 4.

DEFENSES.

See Pleading, 1.

Want of Consideration.

See Bills and Notes, 1, 2.

Splitting Defenses.

See Judgment, 3.

DELIVERY.

See Deeds, 1–6.
See Execution, 3.

DEMAND.

See Garnishment, 10, 12.

When Unnecessary to Give Evidence of Demand.
See Attorney and Client, 3.

DEMURRER.

Acceptance of Facts in Complaint as True.
See Appeal and Error, 22.

DEPARTURE.

See Insurance, 4.

DILIGENCE.

See Master and Servant, 1–6.

DISBURSEMENTS.

See Costs, 2.

DISCOVERED PERIL.

See Railroads, 3–5.

DISCRETION OF COURT.

See Continuance, 1, 2.

DISMISSAL AND NONSUIT.

See Appeal and Error, 6.
See Master and Servant, 14.

DIVORCE.

Divorce—Grounds—Mutual Quarreling.

1. Decree for defendant wife in divorce suit will be affirmed; the evidence as to her conduct showing no more than the childish bickerings of two young people, avoidable by mutual forbearance and self-control. (Bleything v. Bleything, 197.)

ELECTION OF REMEDIES.

Election of Remedies—What Constitutes.

1. A person commencing a suit in ignorance of substantial facts affording a different remedy, may, upon acquiring such information, adopt the alternate remedy. (Oregon Mill & Grain Co. v. Hyde, 163.)

Election of Remedies—Mistake as to Remedy.

2. A judgment creditor's right to set aside a sale by the debtor, void under Bulk Sales Act, Sections 6069–6072, L. O. L., as amended by Laws of 1913, page 537, is not precluded by its previous action

against the purchaser upon a nonexisting promise to pay the debt involved, since pursuing a fancied remedy does not waive the real remedy. (Oregon Mill & Grain Co. v. Hyde, 163.)

See Pleading, 1.

ENCUMBRANCES.

See Vendor and Purchaser, 2.

EQUITABLE ESTOPPEL.

See Estoppel.

EQUITY.

Equity—Pleadings—Admissions—Conclusiveness Against Coparty.

1. An admission in the answer of one defendant is not conclusive upon other defendants. (Murphy v. Bjelik, 329.)

Equity—Damages.

2. The right to recover damages in a suit or cross-suit in equity must depend on some equity which enables the court to secure and retain jurisdiction of the subject matter, and, as an incident, to award the damages inflicted. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Equity—Finding No Equity Exists—Trial to Ascertain Legal Right.

3. Where it is found at hearing of a cause that the equity on which it was predicated does not exist, the suit is terminated, and cannot be tried to ascertain any legal right existing between the parties. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Equity—Jurisdiction.

4. When a court of equity obtains jurisdiction of a cause for a particular purpose, it will retain and exercise jurisdiction to determine all necessary incidents, though they may involve purely legal matters as a part of the relief. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Equity—Objections to Jurisdiction—Time.

5. Where a railroad sued to enjoin interference with its right of way by adjoining owners, and they filed a separate suit in equity to reform their deed to the railroad of the right of way and to enjoin trespass, to which demurrer was overruled, and the railroad filed an answer denying the averments of the complaint and setting forth as a defense the averments of its complaint in the original suit, the rule that objection to jurisdiction in equity comes too late after defendant in answer asks for affirmative relief did not apply. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Equity—Legal Relief—Denial of Equitable Relief—Right.

6. Where a railroad sued to enjoin interference with its right of way by adjoining owners, and they filed a separate suit in equity to reform their deed to the railroad of the right of way and to enjoin trespass, to which demurrer was overruled, and the railroad filed an answer denying the averments of the complaint and setting forth as a defense the averments of its complaint in the original suit, when the land owner's bill was found to be without equity, her claim for damages could not be adjudicated. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Equity—Stay of Proceedings—Appeal on Equitable Issues.

7. Where pending a suit at law equitable defense is interposed and tried, the filing of the cross-bill embodying such defense, by force of Section 390, L. O. L., automatically stays the proceedings at law until judgment is rendered therein, but upon rendition of the judgment the taking of an appeal in the equity suit does not stay the proceedings at law. (Toy v. Gong, 454.)

ERROR.

Curing of Error.

See Appeal and Error, 20.
See Trial, 6.

Error of Law.

See New Trial, 1.

ESTOPPEL.

Estoppel—Equitable Estoppel—Silence.

1. One is usually required to hastily refute oral declarations, made in his presence, affecting him injuriously, but this does not generally apply to letters, except where acted upon or invited. (Depot Realty Syndicate v. Enterprise Brewing Co., 560.)

See Fraudulent Conveyances, 4.
See Judgment, 5.
See Principal and Agent, 2.

EUGENE, CHARTER OF.

See City of Eugene v. Garrett, 435.

EVIDENCE.

Evidence—Presumptions—Knowledge of Law—Knowledge of Bond Containing Statutory Condition.

1. The law imputes to a bank, which lent money to a contractor with the state to install plumbing in certain buildings, knowledge of the contractor's bond containing the statutory condition that the contractor should promptly make payments to all persons supplying labor or materials. (Derby v. United States etc. Co., 34.)

Evidence—Right of Surety to Perform Contract—Notice to Bank.

2. As a matter of law, a bank which lent money to a contractor with the state to install plumbing in its buildings was charged with notice of the right of the contractor's surety to take up and perform the contract on the contractor's default and to be subrogated to all the rights of the state as against him, including the application of the reserve percentages to cover the consequences of his failure. (Derby v. United States etc. Co., 34.)

Evidence—Presumption—Knowledge of Law and Consequences—Compliance With Statute.

3. By operation of law, notice was imparted to a bank, which lent money to a contractor with the state to install plumbing in its buildings, of what was required by the statute as to the contractor's giv-

ing bond, and of what it might have learned by inquiring of the state's officers, i. e., that a bond had been given, so that the surety making good the contractor's default would succeed to all its rights and be subrogated to the state's remedies to work out its reimbursement, all in preference to one holding a demand against the contractor for money lent to him. (Derby v. United States etc. Co., 34.)

Evidence—Presumption—Performance of Official Duty.

4. There is a presumption that an official duty has been regularly performed. (Derby v. United States etc. Co., 34.)

Evidence—Market Value.

5. Where the value of personal property is in issue, if the same has a market value at the time and place in question, the evidence is usually confined to its value at such time and place, or at a reasonable time before and after that particular time. (Stillwell v. Hill, 112.)

Evidence—Market Value.

6. Where the value of personal property is in issue, if it has no market value at the time in question, the market value at some other time, before or after may be shown. (Stillwell v. Hill, 112.)

Evidence—Value.

7. In action for failure to deliver hay, where no difficulty appeared in proving its market value at or about the time it was contracted to be delivered, evidence of its market value several months thereafter, when market conditions were entirely different, was inadmissible. (Stillwell v. Hill, 112.)

Evidence—Judicial Notice—City Charters.

8. Under Laws of 1917, page 514, courts are required to take judicial notice of a city charter after a duly certified copy thereof has been filed with the librarian of the Supreme Court. (Crowe v. Albee, 148.)

Evidence—Judicial Notice—City Limits—Public Survey.

9. In a proceeding under Sections 3276 and 3284, L. O. L., to vacate streets and alleys, where the petition does not state that the addition is without the boundaries of the city, the court, where the limits of the city are fixed by legislative charter, may take judicial notice thereof, and likewise of the public survey of a donation land claim named upon a plat and mentioned in the petition. (City of Eugene v. Garrett, 435.)

Evidence—Admissions—Admissions in Open Court.

10. In an action for damages for breach of contract to convey land, where plaintiff's counsel in open court stated that if the contract was not delivered plaintiff would only be entitled to recover sums paid, such statement is an admission binding on plaintiff, and a verdict for a greater sum cannot be sustained where the jury found that the contract had not been delivered. (Archambeau v. Edmunson, 476.)

Evidence—Employment of Broker—Secondary Evidence—Statute.

11. The provision as to secondary evidence in Section 808, L. O. L., excluding all evidence of an agreement employing a broker to sell real estate, other than the writing or secondary evidence of its contents, refers to cases where the writing is lost or is in the possession

of the adverse party who refuses to produce it on proper notice. (Great Western Land Co. v. Waite, 488.)

Evidence—Parol Evidence Affecting Writing.

12. Section 713, L. O. L., providing that, where the terms of an agreement have been reduced to writing, it is to be considered as containing all of them, and there can be no evidence thereof other than the contents of the writing, prevents parol evidence, in action on a bond, conditioned that the obligors erect a sawmill of certain capacity on their property, that it was the understanding of the parties that a sawmill could not be erected there unless the streets were vacated. (Learned v. Holbrook, 576.)

Evidence—Presumption as to Continuance of Situation.

13. Where, when a trustee's account with a bank was opened, all of the funds belonged to the beneficiaries, the presumption is that such situation continued. (Sanford v. Pike, 614.)

See Appeal and Error, 1, 2, 5.
See Attorney and Client, 1.
See Brokers, 4.
See Contracts, 4.
See Corporations, 4, 10.
See Fraud, 8, 10, 11.
See Insurance, 1.
See Master and Servant, 6, 7, 9.
See Mortgages, 1.
See Municipal Corporations, 2.
See Quieting Title, 2.
See Rewards, 1.
See States, 4.
See Taxation, 1, 3.
See Tenancy in Common, 3.
See Trial, 1, 3–5.
See Trusts, 1.
See Vendor and Purchaser, 1.
See Wills, 2–6.

EXCEPTIONS.

See Appeal and Error, 19.

EXCEPTIONS, BILL OF.

See Appeal and Error, 5, 20.

Absence of Bill of Exceptions.

See Appeal and Error, 18, 24.

EXCHANGE OF PROPERTY.

See Fraud, 4, 8, 9.

EXECUTION.

Execution—Injunction—Pleading.

1. A complaint in a suit to enjoin the sale of real property upon execution could not be sustained as predicated upon the assumption of a continuing or other trespass; for, since levy of execution upon real property is made under Section 233, subdivision 4, L. O. L., by the sheriff's delivering to the county clerk a certificate containing the title

of the cause, the names of the parties to the action, a description of the land, and that the same has been levied upon to satisfy the demand of the judgment creditor, such enforcement of the writ does not imply an entry upon the premises. (Barnes v. Esch, 1.)

Execution—Wrongful Levy—Persons Liable.

2. A seizure by an officer of the property of one not a party to the writ being illegal, when such levy is directed by the party at whose instance the execution was issued, the command renders such party and the officer liable for the damages thus occasioned. (Barnes v. Esch, 1.)

Execution—Execution Sale—Delivery of Deed.

3. Under the Oregon practice a sale on execution partakes of the character of a judicial sale. The right of a purchaser at such a sale to a sheriff's deed is not lost by the expiration of the time within which a second execution could issue on the judgment. (Webster v. Rogers, 547.)

Execution—Acquiring Land at Judicial Sale.

4. It was not fraudulent for a mortgagee of land, who on account of a great number of judgment liens did not desire to foreclose at great expense, to induce a judgment creditor to issue an execution and sell the land, and to buy the land at the sale. (Webster v. Rogers, 547.)

Execution—Sales—Action to Set Aside—Laches.

5. Where the interest of a tenant in common in real property is encumbered with judgment liens in excess of its value, and where such tenant stands by for eighteen years after his cotenant has purchased the former's moiety at execution sale, the purchaser paying all taxes and street improvements and constructing a valuable building on the land, the former will not be heard to attack the execution sale after the expiration of the liens of the judgment with which the property is encumbered. A suit making such an attack on his behalf is barred by laches. (Webster v. Rogers, 547.)

See Chattel Mortgages, 1, 2.
See Garnishment, 3, 6, 7, 10.

EXECUTORS AND ADMINISTRATORS.

Executors and Administrators—Sale of Land—Order of Publication.

1. Under Code directing that publication of citation to heirs on petition for sale of decedent's land shall be for not less than four weeks or for such further time as the court or judge may direct, an order dated July 31st, directing publication of citation on petition for sale of land for not less than ten weeks, and fixing October 2d as the return day, was valid, although there were only eight weeks between the dates named. (Finley v. Morrison, 160.)

FEDERAL EMPLOYERS' LIABILITY ACT.

See Master and Servant, 10.

FINDINGS.

See Appeal and Error, 26.
See Brokers, 5.
See Judgment, 6.

Special Findings by Jury.

See Trial, 10.

Fixtures—Conditional Contract of Sale—Third Persons—Evidence as to Nature of Property.

1. A contract for reservation of title as to a machine *held* to be of great weight in determining whether the machine had been so attached to the realty as to become a part thereof, as against a third party. (Pelton Water Wheel Co. v. Oregon Iron Co., 248.)

FORECLOSURE.

See Appeal and Error, 29.
See Municipal Corporations, 16.
See Reformation of Instruments, 1.
See Tenancy in Common, 1–3.

FOREIGN JUDGMENTS.

See Judgments, 7.

FORFEITURE.

See Usury, 1, 2.

FRATERNAL BENEFIT INSURANCE.

See Insurance, 1–9.

FRAUD.

Fraud—Statement of Material Facts—Good Faith.

1. Where a vendor of land by the acre states there are a certain number of acres in the tract, it renders him responsible for damages if there are less than stated, although he believed it to contain such amount. (Purdy v. Underwood, 56.)

Fraud—Sales of Land—Measure of Damages.

2. Where a purchaser buys what the vendor states to be 112.5 acres of land at $50 per acre and there are only 78.76 acres, the vendee is entitled to recover the excess paid in an action for fraud, even though he sold the same for as much as he paid without knowledge of the shortage; although the measure of damages is different where property is exchanged, the measure of damages in such case being the difference between the value of the property given and that received. (Purdy v. Underwood, 56.)

Fraud—Reckless Misrepresentations.

3. Misrepresentations of material matters recklessly made, as of one's own knowledge, without in fact knowing whether they are true or not, render the maker liable to one who relies and acts thereon to his injury. (Jackman v. Northwestern Trust Co., 209.)

Fraud—Exchange of Land—Measure of Damages.

4. For false representations inducing an exchange of land the measure of damages is the difference between the market value of the property parted with by the person defrauded and the market value of the property received by him. (Ward v. Jenson, 314.)

Fraud—Actionable Fraud—Statements.

5. As a general rule, a false representation does not constitute actionable fraud unless it relates to a fact which is existent or has existed. (Ward v. Jenson, 314.)

Fraud—Opinion.

6. A mere expression of an opinion or a representation in regard to a matter of estimate or judgment does not ordinarily amount to fraud. (Ward v. Jenson, 314.)

Fraud—Actionable Fraud.

7. While a representation of value, when standing alone, is usually regarded as a mere opinion, it may, under special circumstances, be treated as representation of fact. (Ward v. Jenson, 314.)

Fraud—Exchange of Property—Evidence Admissible.

8. In an action for damages for fraud in exchange of land, defendant's statement as to value of his place, when taken in connection with the other evidence, *held* at least to present jury question whether the representation was one of fact. (Ward v. Jenson, 314.)

Fraud—Exchange of Property—Matters Known by Plaintiff.

9. If plaintiff knew that defendant only had a contract to purchase 10 acre tract, and that he had not given a mortgage on it, and, notwithstanding such knowledge, exchanged properties, she cannot predicate fraud upon any statements made by defendant concerning a mortgage. (Ward v. Jenson, 314.)

Fraud—Evidence—Statements by Defendant.

10. A witness testifying to a conversation between plaintiff and defendant was properly permitted to state that defendant told plaintiff that the place he was trading to her was worth $18,000, where it was plain that such statement related to the same conversation concerning which plaintiff had already testified. (Ward v. Jenson, 314.)

Fraud—Damages—Evidence Admissible.

11. In action for damages for fraudulently inducing an exchange of lands, evidence as to the value of plaintiff's land was improperly excluded where defendant's answer denied plaintiff's allegation of value of such land. (Ward v. Jenson, 314.)

See Corporations, 4.
See Landlord and Tenant, 1.
See Vendor and Purchaser, 1, 3.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances—Bulk Sales.

1. A seller's creditor may garnish goods transferred to a purchaser in violation of the bulk sales law (Sections 6069–6072, L. O. L.), as amended by Laws of 1913, page 537. (Oregon Mill & Grain Co. v. Hyde, 163.)

Fraudulent Conveyances—Bulk Sales Act—Effect.

2. Under the Bulk Sales Act (Sections 6069–6072, L. O. L.), as amended by Laws of 1913, page 537, making certain sales void as to the seller's creditors, a sale is valid between the seller and purchaser,

and is merely voidable at the instance of the seller's creditors. (Oregon Mill & Grain Co. v. Hyde, 163.)

Fraudulent Conveyances—Bulk Sales—Ratification.

3. A seller's creditor may waive the fraud and ratify a sale in violation of the Bulk Sales Act (Sections 6069–6072, L. O. L.), as amended by Laws of 1913, page 537. (Oregon Mill & Grain Co. v. Hyde, 163.)

Fraudulent Conveyances—Proceedings Against Garnishee—Estoppel.

4. A judgment creditor's attempt to collect its debt directly from the judgment debtor, etc., *held* not to estop it from proceeding against a garnishee, who had not changed his position because of the creditor's action or statements. (Oregon Mill & Grain Co. v. Hyde, 163.)

FREEHOLDER.

Right to be Heard Before Property is Taken for Tax.

See Municipal Corporations, 26.

GARNISHMENT.

Garnishment—Nature of Liability.

1. A garnishee is liable only because he is indebted to, or has property in his possession belonging to, the debtor, either in fact or in contemplation of law. (Oregon Mill & Grain Co. v. Hyde, 163.)

Garnishment—Right to Judgment on Garnishee's Answer.

2. Under Section 295 et seq., L. O. L., relating to attachment and garnishment and providing that the garnishee shall furnish a certificate of property belonging to the defendant or the amount of any debt owing to the defendant, that if he refuses to give a certificate, or gives one unsatisfactory to plaintiff, he may be required to appear for examination, that the issues between the plaintiff and the garnishee shall be tried as ordinary issues of fact, that if the garnishee fails to answer the court or judge may compel him to do so or plaintiff may have judgment for want of such answer, and that, if it appears from the answer or is found upon the trial that the garnishee had property of defendants beyond that admitted in the certificate or in any amount if a certificate was refused, judgment may be given against the garnishee for the value thereof in money, a judgment against the garnishee is only authorized when he refuses to answer or when his answer is unsatisfactory to plaintiff, and, where he answers by admitting an indebtedness and plaintiff is satisfied with such answer, a money judgment against the garnishee is a nullity and gives plaintiff no right which he would not have without such judgment. (Murphy v. Bjelik, 329.)

Garnishment — Execution — Enforcement — Judgment Against Garnishee.

3. Under Section 308, L. O. L., providing that if judgment is recovered by plaintiff, and it shall appear that property has been attached, the court shall order it sold to satisfy plaintiff's demands, and that if execution issue thereon the sheriff shall apply the attached property or the proceeds thereof upon the execution, and Sections 233 and 234, relating to the manner of executing a writ of

execution and providing that, in the case of property in the possession of or owing from any garnishee, if it appear from the garnishee's certificate that he is owing a debt then due, and if such debt is not paid by the garnishee to the sheriff on demand, he shall levy on the property of the garnishee as if the execution was against the garnishee's property, but that if such debt be not then due the sheriff shall sell the same as other property, the sale of a debt which has matured and is due is not contemplated, and an order directing the sheriff to sell a debt due from the garnishee would be a nullity. (Murphy v. Bjelik, 329.)

Garnishment—Nature of Right Acquired by Plaintiff.

4. Garnishment does not create a lien in favor of plaintiff upon any money in the hands of the garnishee, nor upon any property owned by it, but gives rise to a contingent personal liability to respond to any judgment that may afterward be recovered by plaintiff against the garnishee's creditors. (Murphy v. Bjelik, 329.)

Garnishment—Nature of Right Acquired by Plaintiff.

5. When plaintiff, in an action in which a garnishee files an answer satisfactory to plaintiff, secures a judgment, it does not create a lien upon any property of the garnishee, as the only judgment to which he is entitled is a judgment against the defendants in the action. (Murphy v. Bjelik, 329.)

Garnishment — Execution — Enforcement — Judgment Against Garnishee.

6. Under Section 234, L. O. L., providing that, if it appear from the certificate of a garnishee that he is owing a debt to the judgment debtor then due if such debt is not paid to the sheriff on demand he shall levy on the garnishee's property, a demand on the garnishee for payment is jurisdictional and mandatory, and not merely directory, and a sale without such demand is void, as a levy upon and a sale of property of a garnishee under such circumstances is a pure proceeding *in invitum*, and the requirements of the statute ought to be strictly followed. (Murphy v. Bjelik, 329.)

Garnishment—Execution—Levy on Property of Garnishee.

7. Under Section 234, L. O. L., as to execution against property in possession of a garnishee, if it appears from the certificate of the garnished third person that he is owing a matured debt to the judgment debtor in the action, the sheriff who is armed with writ of execution against the property of the judgment debtor, if such debt is not paid on demand, must levy on the property of the garnished third person as if the execution was against his property. (Murphy v. Bjelik, 329.)

Garnishment—Jurisdiction Authorizing Entry of Judgment Against Garnishee.

8. Though by Section 301, L. O. L., a garnished third person, from the time of service of a copy of the writ and notice, is liable to plaintiff until the attachment be discharged or judgment satisfied, such service of writ and notice does not confer jurisdiction over the person of a garnishee so as to authorize entry of judgment against such garnishee, as the order prescribed in Section 303 must be obtained and served before the court acquires jurisdiction to render judgment against a garnishee who either refuses to give a certifi-

cate that he owes a matured debt or gives an unsatisfactory certificate. (Murphy v. Bjelik, 329.)

Garnishment—Judgment Against Garnishee.

9. Section 983, L. O. L., as to the means to be used by the court to execute its powers, does not authorize judgment against a garnishee which has given a certificate of indebtedness, as it applies only where jurisdiction is conferred otherwise on a court or judicial officer, and cannot itself be the source of jurisdiction. (Murphy v. Bjelik, 329.)

Garnishment—Levy of Execution on Garnishee's Property—Demand.

10. If there is no authority for judgment against a garnished person who has given a certificate of indebtedness, the demand on him prescribed by Section 234, L. O. L., is an indispensable prerequisite to satisfaction of an execution against the judgment debtor's property from that of the garnishee. (Murphy v. Bjelik, 329.)

Garnishment—Judgment Against Garnishee.

11. Where there was no statutory authority for judgment against a garnishee which had given a certificate of indebtedness, the Circuit Court's attempted judgment was a nullity, and in contemplation of law it was no judgment at all. (Murphy v. Bjelik, 329.)

Garnishment—Levy and Sale of Garnishee's Property—Void Character.

12. Where authority to seize the property of a garnishee company under execution against the property of the judgment debtor company could have been brought into existence only by first making demand upon the garnishee company to pay its debt to the judgment debtor company, and where the record does not affirmatively show that such authority was brought into existence, levy and sale of the garnishee company's property were void. (Murphy v. Bjelik, 329.)

See Fraudulent Conveyances, 4.

GOOD FAITH.

See Fraud, 1.

GRANTS PASS, CHARTER OF.

See City of Grants Pass v. Rogue River Pub. Serv. Corp., 637.

GUARANTY.

Guaranty—Liability of Guarantor—Landlord and Tenant.

1. An indorsement on a lease, "for valuable consideration we hereby guarantee the faithful performance by the above lessees of all their obligations," makes the obligation joint and several, and the landlord can sue the guarantor for rent without making effort to collect from the lessee. (Depot Realty Syndicate v. Enterprise Brewing Co., 560.)

See Corporations, 7, 9, 10.

HARMLESS ERROR.

See Appeal and Error, 1, 10.

HIGHWAYS.

Highways—Defects—Personal Injuries—Burden of Proof.

1. Under Section 6375, L. O. L., giving persons injured on county highways a right of action, one injured by defects in highway must, to recover, prove that he was lawfully traveling thereon; that he was injured by reason of a defect therein; that his own negligence did not contribute to such injury; that he had no knowledge of the defect or dangerous condition of the highway. (Buttle v. Douglas County, 105.)

Highways—Personal Injuries—Liability of County—Dirt Roads.

2. Section 6375, L. O. L., giving persons injured on county highways a right of action, on account of defects, applies to any county road, regardless of material, and so applies to dirt roads; it being the duty of the county to keep its highways in a reasonably safe condition, whatever the material used. (Buttle v. Douglas County, 105.)

Highways—Personal Injuries—Liability of County—Dirt Roads—Questions for Jury.

3. Evidence *held* to present question for jury whether driver of stage-coach, which tipped over owing to deep mudhole in highway and injured plaintiff, was negligent. (Buttle v. Douglas County, 105.)

Highways—Personal Injuries—Action—Issues.

4. Where plaintiff alleged injuries on a duly and legally established county road, and the answer so admitted, no issue as to whether the road was established by prescription could be tried, in the absence of allegation to such effect. (Buttle v. Douglas County, 105.)

Highways—Personal Injuries—Question for Jury.

5. In action for injuries when stage-coach tipped over, due to mudhole, in county highway, where evidence warranted finding that neither plaintiff nor the driver was negligent, and that the road was defective, there was no error in denying nonsuit. (Buttle v. Douglas County, 105.)

Highways—Contract for Work—Bond—Use of Engine—Compensation.

6. The bond of a contractor with a county for improving a highway, who was to furnish all material, tools, and equipment and labor, conditioned that he shall pay all subcontractors and laborers, materialmen, and all persons who shall supply laborers or subcontractors with materials or supplies for carrying on the work, covers compensation to the owner for the use of an engine hired by a subcontractor for work in grading. (Multnomah County v. United States F. & G. Co., 198.)

Highways—Contract for Work—Bond—"Labor and Material"—Use of Engine.

7. Though the use of an engine is not strictly "labor and material," a bond for payment of which Section 6266, L. O. L., requires a county to exact of a contractor for work, a bond taken broad enough to cover compensation therefor is valid. (Multnomah County v. United States F. & G. Co., 198.)

Highways—Levying Special Road Tax—Budget Law.

8. Under Laws of 1915, page 297, making the budget law (Laws 1913, p. 458) applicable to all districts, etc., having power to levy

taxes, except cities of over 150,000 inhabitants, failure of a road district in levying a special road tax to comply with the budget law invalidates the levy, notwithstanding the people of the district assemble in a body to vote on the levy. (Oregon-Wash. R. & N. Co. v. Johnson, 240.)

Highways—Delegation of Power to Improve—Limitation of Exercise to County Officers—Statute.

9. The delegation of power to the County Court, by Laws of 1917, page 588, Section 2, to improve a county road, limits its exercise to the specified authority, thereby excluding the councilmen of a city or any other officer or person, except as assistant to a member of the County Court or other county officer. (Cooper v. Fox, 657.)

See Vendor and Purchaser, 2.

HOMESTEAD.

Homestead—Extent of Right in City Property—Improved Lot Worth More Than $1,500—Statute.

1. Under Section 221, L. O. L., providing that the homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment, and such homestead must be the actual abode of, and owned by, the family or some member, and under Section 222, providing the homestead shall not exceed $1,500 in value, nor 160 acres, if not located in town or city laid off into blocks and lots, in which case it shall not exceed one block, but that in no instance shall such homestead be reduced to less than 20 acres, or one lot, regardless of value, despite Sections 224 and 225, relating to the procedure to secure and confirm the homestead right, a husband and wife had right of homestead exempt from execution in their city property, comprising one lot with the house thereon, worth in excess of $1,500; that is, about $15,000. (Watson v. Hurlburt, 297.)

Homestead—"One Lot"—Statute.

2. Homestead property in a city, consisting of approximately adjacent halves of two lots in a block irregular in shape and not of uniform size, being 50 feet in width on one street and 50.12 feet on another, the same as the lots in that part of the block, consisted of a "single lot" within the homestead statute (Sections 221, 222, L. O. L). (Watson v. Hurlburt, 297.)

Homestead—Construction of Homestead Laws.

3. Homestead laws are remedial in their nature, and should be liberally construed to effect their purpose. (Watson v. Hurlburt, 297.)

Homestead—Notice of Claim of Exemption—Efficacy.

4. Where property of husband and wife was attached October 23d, and October 24th the husband served on the levying officer a notice of claim of exemption as homestead as the actual abode of himself and family, such notice was prompt and timely, and not rendered insufficient or lessened in force because the wife, on behalf of the family, served a similar notice after the court had ordered sale of the attached property. (Watson v. Hurlburt, 297.)

Homestead—Waiver—Failure to Appear in Action.

5. There was no waiver of the right of homestead by the failure of the husband who claimed it to appear in the action against him

wherein the property was attached, and to object to the order of sale of the homestead property. (Watson v. Hurlburt, 297.)

Homestead—Absence of Husband and Head of Family.

6. The law will not deprive a family, consisting of husband and wife, of a homestead on the ground that the property is not occupied as such within the intent of the homestead law, merely because the husband and head of the family is absent on business in another state, or away temporarily for other reasons. (Watson v. Hurlburt, 297.)

See Constitutional Law, 2.

HUSBAND AND WIFE.

Husband and Wife—Agency of Husband for Wife—Execution of Note.

1. The ostensible maker of a note was liable thereon, whether she signed it with her own hand, or the signature was made by her husband by her authority. (Bank of Kenton v. Preble, 230.)

See Setoff and Counterclaim, 2.

Absence of Husband and Head of Family.

See Homestead, 6.

INDICTMENT.

Indictment and Information—Supplying Omissions Unlawfully.

1. The use of the word "unlawfully" in a criminal accusation for a statutory misdemeanor cannot, in the absence of an enactment to that effect, supply the omission of a statement of facts necessary to show the commission of the offense. (City of Astoria v. Malone, 88.)

See Intoxicating Liquors, 3.

INFANTS.

Infants—Support—Mother's Aid—Application.

1. Under Laws of 1913, page 75, entitling every woman who has children under the age of 16 years, and whose husband is dead, and the support of whose child or children is dependent wholly or partly upon her labor, to receive assistance from the county, an application by a widow for support which discloses that her husband left an estate consisting partly of life insurance, but which failed to disclose whether he died testate so that it could be determined to whom the property belonged, and also averred that the widow had no money in the bank, so that it did not appear that either of her children were dependent upon her labor, was insufficient to show that the applicant was entitled to support. (Badura v. Multnomah County, 446.)

INJUNCTION.

Injunction—Trespass—Cutting Timber.

1. Equity will intervene to prevent a trespass upon real property by cutting timber. (Barnes v. Esch, 1.)

Injunction—Trespass—Permanent Injury.

2. A continuing trespass committed upon real property, tending to a removal of earth or of any substance therein or permanently attached thereto, will usually be enjoined in a suit instituted for that

purpose by the party sustaining the injury. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Injunction—Trespass—Legal Remedy.

3. When the recurrence of injury by trespass is not reasonably to be apprehended, the remedy at law for recovery of damages is usually regarded as adequate, and relief by injunction will usually be denied. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Injunction—Trespass—Damage.

4. Where railroad cut brush along right of way and left it on adjoining land, an action at law to recover the expense reasonably to be incurred in removing the brush affords an adequate remedy, and no exigency exists for resorting to the court of equity. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Injunction—Continuing Injury—Diversion of Water.

5. Where a railroad in changing its roadbed diverted the water of a brook so that it seeped through the embankment and damaged adjoining land, such acts constituted a continuing trespass. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Injunction—Laches—Trespass.

6. Where the owner of land adjoining a railroad for seven years after the railroad diverted a stream so as to cause seepage on the land asserted no rights and sought no relief, her long delay precluded equitable intervention. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Injunction—Sale of Stock for Illegal Assessment.

7. Suit in equity for protection of a private right being allowed by Section 389, L. O. L., where action at law cannot furnish a plain, speedy and adequate remedy, sale of stock for an illegal assessment may be enjoined. (First Nat. Bank v. Multnomah State Bank, 423.)

See Criminal Law, 1.
See Execution, 1.
See Mines and Minerals, 1.
See Municipal Corporations, 23.
See Waste, 1.

INJURIES.

See Animals, 1.
See Personal Injuries.

INSTRUCTIONS.

See Appeal and Error, 19.
See Insurance, 2, 6.
See Municipal Corporations, 12.
See Trial, 6, 11, 12.

Misleading Instructions.

See Railroads, 5.

INSURANCE.

Insurance—Accidents—Admissibility of Evidence.

1. In action on a policy insuring against accidents causing disability to transact business, testimony regarding plaintiff's suffering, etc., is inadmissible. (Kendall v. Travelers' Protective Assn., 179.)

Insurance—Fraternal Benefit Insurance—Instructions.

2. In action on a benefit accident policy, refusing requested instructions that defendant's constitution and by-laws were binding upon plaintiff, *held* erroneous. (Kendall v. Travelers' Protective Assn., 179.)

Insurance—Accident Policy—Pleading.

3. Plaintiff's allegation that he had complied with all terms of an accident insurance policy, *held* sufficient under the direct provisions of Section 88, L. O. L. (Kendall v. Travelers' Protective Assn., 179.)

Insurance—Accident Policy—Departure—Pleading.

4. Where plaintiff's allegation that he had complied with all provisions of an insurance policy was denied by an answer stating the required notice was not given, plaintiff's reply that such failure was excused by his physical disability, etc., *held* not a departure. (Kendall v. Travelers' Protective Assn., 179.)

Insurance—Accident Policy—Time to Give Notice.

5. An accident policy requiring notice of injury within thirty days, unless insured was unconscious or disabled, is not breached by insured's failure to give such notice during some seven days following the accident before plaintiff became physically disabled. (Kendall v. Travelers' Protective Assn., 179.)

Insurance—Accident Policy—Requested Instruction.

6. In action on a fraternal accident policy, defendant's requested instruction that plaintiff was bound by its constitution and by-laws although he and his family were ignorant thereof, was properly refused because of the reference to plaintiff's family. (Kendall v. Travelers' Protective Assn., 179.)

Insurance—Accident Policy—Jury Question.

7. Evidence regarding the manner in which a barber removed an ingrowing hair from plaintiff's face, with his consent, resulting in poisoning, etc., *held* to make a jury question whether the injury was accidental within a fraternal benefit policy. (Kendall v. Travelers' Protective Assn., 179.)

Insurance—Accident Policy—"Accidental Means."

8. A wound intentionally made by a barber in removing an ingrowing hair from plaintiff's face, with his consent, *held* not made by "accidental means" within a fraternal benefit policy. (Kendall v. Travelers' Protective Assn., 179.)

Insurance—Accident Policy—Time to Sue.

9. Where a fraternal benefit association's constitution required claims to be presented after total recovery, and authorized benefits for 2 years' disability, a suit for 32 months' disability, commenced 7 months after refusal of the claim, *held* brought in time, although the constitution required suit to be brought within 6 months after the claim's refusal. (Kendall v. Travelers' Protective Assn., 179.)

INTEREST.

Interest—Accrual of Right—Unliquidated Demand.

1. Under Section 6028, L. O. L., providing for interest on money received for the use of another and retained beyond a reasonable

time, in an action on an official bond of a defaulting city treasurer not stipulating for interest, there could be no recovery of interest until after judgment; the amount of liability not having been ascertained or agreed upon. (City of Seaside v. Oregon Surety & Casualty Co., 624.)

On Reassessment for Public Improvement.

See Municipal Corporations, 4.

INTERPLEADER.

Interpleader—Conflicting Claims—Nature.

1. The publisher of a number of periodicals offered prizes for the best solutions of a puzzle. After the close of the contest certain contestants claimed a number of the highest prizes, asserting that other contestants who submitted the four best solutions and three of whom were fellow countrymen, and related by blood or marriage, had violated the rules of the contest and were guilty of fraud or collusion, and that their solutions were the result of the individual efforts of one man. The contestants submitting these best solutions also claimed the prizes, and were only prevented from bringing actions therefor by an injunction in an interpleader suit brought by the publisher. *Held*, that there was a proper case for entertaining a bill of interpleader. (Statesman Pub. Co. v. Foltin, 65.)

See Rewards, 1.

INTOXICATING LIQUORS.

Intoxicating Liquors—Jurisdiction of Police Courts.

1. Under Laws of 1915, page 166, section 32, providing that justices of the peace and other courts having jurisdiction as such shall have concurrent jurisdiction with the Circuit Court for violations of the act, police courts generally possess the same authority to hear and determine cases as Justice's Courts, and have concurrent jurisdiction with the Circuit Court of most violations of the prohibitory laws. (City of Astoria v. Malone, 88.)

Intoxicating Liquors—Prosecutions Under Ordinances—Statutes Applicable.

2. Laws of 1915, page 166, Section 33, providing that it shall not be necessary for the state to allege that the party charged did not have legal authority to sell such liquor, or was not within any of the exceptions of the act, has no application to a prosecution under a municipal ordinance. (City of Astoria v. Malone, 88.)

Intoxicating Liquors—Negativing Exceptions—"Indictment."

3. Under ordinance making it unlawful to have in possession intoxicants "not permitted by the general laws of the State of Oregon," the quoted exception being a part of what is usually termed the "enacting clause" must be negatived, and a complaint not negativing such exception by appropriate language was demurrable in view of Section 2482, L. O. L., providing that a complaint is to be deemed an indictment within the provisions of Chapter 7 of Code of Criminal Procedure (Sections 1435–1460, L. O. L.), as to sufficiency of indictment. (City of Astoria v. Malone, 88.)

IRRIGATION.

See Waters and Watercourses, 2.

IRRIGATION DISTRICTS.

See Waters and Watercourses, 1.

JUDGMENT.

Judgment—Matters Concluded.

1. When the second action between the same parties is upon a different claim or demand or cause of action, the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined, whether the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive *per se*. (Stillwell v. Hill, 112.)

Judgment—Matters Concluded.

2. The omission to take advantage of matter of counterclaim as a defense is no bar to a cross or separate action upon it, so that, though, the cross-claim be admissible by way of defense, the defendant has an option to avail himself of it in that form, or to sue upon it in another action. (Stillwell v. Hill, 112.)

Judgment—Splitting Defenses.

3. Defendants in action for hay sold could elect whether they would, in that action, plead and recover on their counterclaim for damages for failure of plaintiffs to deliver all the hay contracted for, or deny the delivery and bring an independent action for damages resulting from failure to deliver. (Stillwell v. Hill, 112.)

Judgment—Matters Concluded.

4. Where sellers of hay sued for balance on the contract, and the issue whether the hay representing such balance had been delivered was determined against them, they could not, when later sued by the purchasers for failure to deliver such balance of the hay, plead as a separate defense and counterclaim their delivery of such hay; the prior judgment being conclusive upon such issue. (Stillwell v. Hill, 112.)

Judgment—Waiver of Estoppel of Former Judgment.

5. The estoppel of a former judgment, determining that sellers had not delivered all the hay contracted for, was not waived by the purchasers bringing an action for damages for the failure to deliver the full amount contracted for, since any such waiver must necessarily relate to a question determined in the former action. (Stillwell v. Hill, 112.)

Judgment—Necessity of Findings.

6. Under Section 570, L. O. L., providing that the only pleadings in a matter of disputed costs are the statement of the prevailing party and the objection of the opposite litigant, that the issue shall be heard by the court without a jury, and that as soon as convenient the court or judge shall make and file a correct itemized statement of the costs

and disbursements as allowed and render judgment accordingly, and that no other finding or conclusion of law or fact shall be necessary, where the court made no statement of the amount of costs and disbursements properly taxable, but merely ordered that the cost bill filed by plaintiff be allowed and directed the clerk to tax the amounts thereof as plaintiff's costs, the judgment taxing costs, being without any findings to support it, was void. (School Dist. No. 30 v. Alameda Constr. Co., 132.)

Judgment—Suit on Foreign Judgment—Limitations.

7. Under Section 3, L. O. L., providing that actions at law shall only be commenced within the periods prescribed after the cause of action shall have accrued, except where a different limitation is prescribed, Section 5 barring actions upon judgment or decrees of any court of the United States or of any state or territory in ten years, and Section 16 providing that if when the cause of action shall accrue against any person who shall be out of the state such action may be commenced within the term herein limited after the return of such person into the state, etc., although the judgment defendants had resided within the state less than ten years, and the action on the judgment was not barred in the state where the judgment was rendered, it would be barred here where more than ten years had expired since the judgment was rendered, Section 16 being inapplicable to a nonresident. (Fargo v. Dickover, 215.)

Judgment—Conclusiveness—Matters Concluded.

8. Where in a former suit between the same parties it was decreed that defendants had no interest in the property involved, such decree is conclusive as to the interest of defendants in a subsequent suit to enjoin foreclosure of a mortgage given by one of the defendants. (Cook v. Nolan, 228.)

Judgment—Entry Nunc Pro Tunc.

9. In sewer construction reassessment proceedings, where no judgment was entered upon verdict in Circuit Court, and no order entered except an order discharging the jury, which, under section 179, L. O. L., defining a judgment as the final determination of the parties' rights, is not a judgment, but, on appeal to the Supreme Court, both parties assumed judgment was duly entered, the court could, two years thereafter, enter judgment on the verdict *nunc pro tunc*, notwithstanding Section 201, requiring the clerk to enter judgment on the verdict the day it is returned, for, the law leaving the court no discretion, it operates in lieu of formal action by the court as a direction to the clerk to enter judgment. (City of Portland v. Blue, 271.)

Judgment—Res Judicata—Questions Concluded.

10. In an action at law for wages wherein equitable cross-bill setting up partnership was interposed, a decree merely dismissing the cross-bill must be read with the pleadings, and with the findings of fact and conclusion of law to the effect that no partnership existed, and against the record disclosed an adjudication against the claim of partnership, under Section 759, L. O. L., and such issue could not be again tried in the action at law. (Toy v. Gong, 454.)

Judgment—Res Judicata—Appeal.

11. In an action at law for wages, where the defense of partnership was interposed, the fact that an appeal on the equitable issues was pending does not prevent the decree appealed from from being available as evidence to support a plea of *res judicata.* (Toy v. Gong, 454.)

Judgment—Priority of Lien—Unrecorded Conveyance.

12. Under Section 207, L. O. L., providing that a conveyance of real property shall be void as against the lien of a judgment, unless recorded at the time of docketing the judgment, or unless recorded within the time after its execution provided by law, a judgment lien, in order to have precedence over a prior unrecorded deed, must have been taken or acquired in good faith, without notice or knowledge of the unrecorded conveyance. (Belcher v. La Grande Nat. Bank, 665.)

Judgment—Priority of Lien—Unrecorded Conveyance.

13. Where owners of land, who had contracted to sell it, conveyed the land and assigned the contracts to the grantee, but the deed was not recorded, the possession of the land by the executory purchasers was such possession by strangers to the legal title as charged a judgment creditor with notice of the grantee's rights, though the premises were in possession of the same persons before and after the conveyance. (Belcher v. La Grande Nat. Bank, 665.)

See Appeal and Error, 10, 22.
See Garnishment, 2, 3, 6, 8, 9, 11.
See Pleading, 1, 2.
See Setoff and Counterclaim, 2.

Directing Judgment in Appellate Court.

See Appeal and Error, 23.

Satisfaction of as Evidence of Employment.

See Attorney and Client, 1.

JUDICIAL NOTICE.

See Evidence, 8, 9.

JUDICIAL SALE.

Acquiring Land at Judicial Sale.

See Execution, 4.

Suit to Set Aside Execution Sale.

See Execution, 5.

Void Levy and Sale of Garnishee's Property.

See Garnishment, 10–12.

Buying Interest of Tenant in Common at Judicial Sale.

See Tenancy in Common, 1–3.

JURISDICTION.

See Appeal and Error, 7.
See Courts, 2–4.

See Equity, 4, 5.
See Garnishment, 8.
See Intoxicating Liquors, 1–3.
See Municipal Corporations, 14.

Of County Court Over County Roads.
See Municipal Corporations, 32.

JUSTICES OF THE PEACE.

Justices of the Peace—Setoff of Judgments—Statutes.

1. Section 2443 et seq., L. O. L., providing for setting off one judgment against another when given in Justices' Courts, if between the same parties and mutual, evinces a legislative policy, in the absence of any statute regulating equitable setoffs in courts of record, of requiring that the demands shall be mutual and exist between the same parties before they can be employed to extinguish, wholly or in part, the rightful claim of the adverse party. (Barnes v. Esch, 1.)

Justices of the Peace—Proof of Service—Sufficiency.

2. Where the sheriff's return on summons did not state that copy of complaint served with summons was certified to be correct by plaintiff, his agent or attorney or the justice, the service was insufficient to warrant a judgment by default, in view of Section 2420, L. O. L., providing that the summons shall be served by delivering a copy thereof, together with a copy of the complaint certified to be correct by plaintiff, his agent or attorney or the justice. (Spencer v. Small, 662.)

KNOWLEDGE.

See Brokers, 6.
See Railroads, 4.

Knowledge of Law.
See Evidence, 1, 3.

LABOR.

See Master and Servant, 16.

LACHES.

See Execution, 5.
See Injunction, 6.

LANDLORD AND TENANT.

Landlord and Tenant—Right to Rescind Contracts—Fraud—Waiver.

1. Where a tenant was induced to lease an apartment house and purchase the furniture therein by fraud and false representations, and paid rent after full knowledge of the fraud, she waived her right to rescind. (Hills v. Campbell, 690.)

See Guaranty, 1.

LARCENY.

See Municipal Corporations, 28, 29.

LAST CLEAR CHANCE.
See Municipal Corporations, 12.

LEASE.
See Corporations, 7, 9.
See Guaranty, 1.
See Mortgages, 6.

LEGAL RIGHTS.
See Equity, 3, 6.
See Injunction, 3.

LEVY.
Persons Liable for a Wrongful Levy.
See Execution, 2.

Levy and Sale of Garnishee's Property.
See Garnishment, 7, 10, 12.

LIABILITY.
See Constitutional Law, 4.
See Garnishment, 1.
See Guaranty, 1.
See Master and Servant, 5.

Of County for Personal Injury.
See Highways, 1–5.

On Contractor's Bond.
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LIENS.
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As to Priority of Lien.
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LIGHTING PLANTS.
Damage to City for Failure to Install.
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LIMITATION OF ACTIONS.
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LIQUIDATED DAMAGES.
See Damages, 4–7.

MANDAMUS.
Mandamus—Compelling Court to Act on Petition.
1. Under Section 613, L. O. L., authorizing the issuance of a writ of *mandamus* to compel the performance of an act which the law

specially enjoins as a duty resulting from an office, a petition by a widow for a writ of *mandamus* to compel the county juvenile court to act upon her application for aid from the county for the support of her children will be denied where the application fails to show that she is entitled to aid. (Badura v. Multnomah County, 446.)

MARKET VALUE.

See Evidence, 5–7.

MASTER AND SERVANT.

Master and Servant—Contract of Master to Furnish Medical Services—Duty of Servant.

1. Where a lumber company posted notice that it charged employees with a hospital fee of 75 cents a month after the first three days' employment, etc., and an employee paid the specified fees, there was a complete contract, requiring the company to furnish the services of its physician to the employee under the circumstances specified in the notices; it was the duty of the employee to apply for such services before employing another physician, and his duty to use reasonable diligence to find the company's physician and request his services before employing another, and if he failed to use such diligence he cannot hold the company liable for sums paid another physician. (Crites v. Willamette Val. Lum. Co., 10.)

Master and Servant—Contract to Furnish Servant With Medical Services—Diligence of Servant to Find Company's Physician—Question for Jury.

2. Whether or not the employee used such diligence was a question of fact for the jury to determine. (Crites v. Willamette Val. Lum. Co., 10.)

Master and Servant—Employer's Contract to Furnish Medical Services—Duty of Servant.

3. If an employee requiring the services of the employer's physician, the employer having contracted to furnish medical services, is ignorant as to who the physician is, it is his duty to inquire and ascertain same from the employer, or, when the name and place of business or residence of the physician is known, the employee should apply where it is reasonable to suppose the doctor may be found. (Crites v. Willamette Val. Lum. Co., 10.)

Master and Servant—Contract of Master to Furnish Medical Services—Diligence of Servant or Wife.

4. Where the wife of the employee of a lumber company which had contracted to furnish him medical services, when he was attacked by appendicitis, went at 8 in the morning to the residence of the company's physician, and learned he was out of town, at 1:30 in the afternoon went to a neighbor's house and telephoned the doctor's residence, but was again informed that he was absent, and, being a trained nurse, and becoming alarmed at her husband's condition, then called in another doctor, who operated, there was no lack of diligence on the part of the employee or his wife, in attempting to secure the attendance of the employer's physician, such as would preclude recovery from the employer of the fees paid the other doctor. (Crites v. Willamette Val. Lum. Co., 10.)

Master and Servant—Contract to Furnish Servants Medical Attention —Breach—Liability.

5. Where an employer, which contracts for consideration to furnish medical attention to its servants, holds out to them a particular person as its physician, and an employee uses reasonable diligence to secure his services in an illness, finds him absent, and, after waiting a reasonable time for his return, employs and pays another physician, the employer must reimburse him for the payment thus made to the other physician. (Crites v. Willamette Val. Lum. Co., 10.)

Master and Servant—Contract to Furnish Medical Attendance to Servants—Action for Breach—Evidence.

6. In a servant's action against his employer, which had contracted to furnish medical attendance in case of illness, for fees paid a physician other than the employer's, the latter having been absent when the servant was attacked by appendicitis, testimony of another employee that on several occasions when injured he had gone to the office of the employer's physician and found him absent, and was not directed to apply to any other physician, was properly admitted to show that the custom of the doctor, to which he testified, of keeping an attendant at his office, who, in his absence, made arrangements for the proper treatment of his patients, had not always been observed. (Crites v. Willamette Val. Lum. Co., 10.)

Master and Servant—Injury to Servant—Failure to Warn—Evidence.

7. In an action by a trackman for injuries based on defendant railroad's negligence in failing to give warning of approaching train, *held*, under evidence, that jury was authorized to infer that no whistle was sounded. (Morata v. Oregon-Wash. R. & N. Co., 219.)

Master and Servant—Injury to Servant—Duty to Warn.

8. Where defendant railroad's employees saw plaintiff at work on a switch when the train was about a third of a mile away, it was their duty to sound the whistle or ring the bell, the weather being cold and windy, so that plaintiff had his cap pulled down over his ears. (Morata v. Oregon-Wash. R. & N. Co., 219.)

Master and Servant—Injury to Servant—Contributory Negligence—Sufficiency of Evidence.

9. In an action by a trackman for injuries based on defendant railroad's negligence in failing to give warning of approach of train, *held*, under evidence, that jury was entitled to infer that plaintiff had no knowledge of the approach of the train prior to the accident. (Morata v. Oregon-Wash. R. & N. Co., 219.)

Master and Servant—Injury to Servant—Federal Employers' Liability Act—Contributory Negligence.

10. Where the track on which plaintiff was working was used by defendant railroad in interstate commerce, plaintiff was within the protection of Act Cong. April 22, 1908, Chapter 149, Section 3, 35 Stat. 66 (U. S. Comp. Stats. 1916, § 8659), and his contributory negligence would not bar recovery. (Morata v. Oregon-Wash. R. & N. Co., 219.)

Master and Servant—Injury to Servant—Assumption of Risk—Custom.

11. Under Act Cong. April 22, 1908, Chapter 149, Section 4 (U. S. Comp. Stats. 1916, § 8660), as to assumption of risk, where a track-

man working on a track used in interstate commerce was run down by a train which gave no warning, recovery could not be defeated on theory of assumption of risk in the absence of evidence of a custom, of which he had knowledge, to operate trains without giving warning. (Morata v. Oregon-Wash. R. & N. Co., 219.)

Master and Servant—Action for Wages—Variance—Express Contract of Quantum Meruit.

12. In an action at law for wages, wherein plaintiff was required to elect whether to proceed on the contract price or for the reasonable value of the services, recovery may be had upon *quantum meruit*, although evidence as to the express hiring was introduced; the stipulated price in such case becoming the *quantum meruit*. (Toy v. Gong, 454.)

Master and Servant—Question for Jury—Cause of Injury.

13. In action for death of servant by master's negligence, where an eye-witness saw the accident, which did not involve any probability as to its cause, the principle that, when there are two or more probable causes of an injury, the question should be submitted to the jury, did not apply. (York v. Southern Pac. Co., 695.)

Master and Servant—Action for Death of Servant—Direction of Nonsuit.

14. Nonsuit *held* properly directed in action under Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. Stats. 1916, §§ 8657–8665), for death of car-dumper killed while attempting to board a train of flat cars in motion, where he was walking along by the standing train, and had opportunity to board it while standing still, but did not attempt to board it until it was in motion. (York v. Southern Pac. Co., 695.)

Master and Servant—Injuries to Servant—Scope of Employment—Necessity of Showing.

15. Although the complaint alleged that it was the deceased servant's duty to help the train crew in making up a train, and that while helping in switching he was killed, there was no error in taking case from jury in the absence of evidence that as a part of his duties he was required to board the moving train in switching, in doing which he missed the step and was killed, since in the absence of such showing it was entirely conjectural whether deceased was engaged in his employment or in his own affairs. (York v. Southern Pac. Co., 695.)

MEASURE OF DAMAGES.

See Fraud, 2, 4.
See Trespass, 2.

MILEAGE.

Attendance of Witnesses from Outside the County.

See Witnesses, 1.

MINES AND MINERALS.

Mines and Minerals—Injunction—Removal of Ore.

1. The removal of ore from the premises of another without his consent will be enjoined. (Barnes v. Esch, 1.)

MISDEMEANOR.

See Municipal Corporations, 8.

MISREPRESENTATIONS.

See Fraud, 3.

MISTAKE.

See Vendor and Purchaser, 6, 7.

As to Remedy.

See Election of Remedies, 2.

MONEY HAD AND RECEIVED.

See Attorney and Client, 1–3.

MORTGAGES.

Mortgages—Deed Given as Security—Evidence.

1. Evidence *held* sufficient to warrant a finding that a deed absolute in form was intended only as security for a loan. (Purdy v. Underwood, 56.)

Mortgages—Deed Given to Secure Loan—Title.

2. A deed absolute in form given to secure a loan does not pass the title and is nothing more than a "mortgage." (Purdy v. Underwood, 56.)

Mortgages—Receiver—Mortgagee in Possession.

3. Receiver of mortgaged property of an insolvent is properly appointed at suit of mortgagor's creditors, though the mortgagee or its alienee be rightfully in possession; both being insolvent, and the expenses of caring for property exceeding receipts from sales and rentals. (Brayton & Lawbaugh v. Monarch Lum. Co., 365.)

Mortgages—Absolute Deed.

4. Giving a deed to secure a debt, and receiving an agreement to reconvey on payment of the debt, make the transaction a mortgage, although the giving of a deed in satisfaction of a debt, and at the same time receiving an agreement to convey, would not constitute a mortgage. (Angus v. Holbrooke, 543.)

Mortgages—Injury to Premises—Action—Tender.

5. Where plaintiffs deeded land to secure a debt, and defendant agreed to reconvey the land in the condition in which received, it was not necessary to make a tender before suit for damages, where defendant had committed waste and refused to restore it when demanded under the terms of the contract. (Angus v. Holbrooke, 543.)

Mortgages—Priority of Liens—Assignment of Lease.

6. A note executed by the owner of a building and secured by her assignment of a lease of part thereof created a lien which must be postponed to the liens of the owner's mortgages, except in so far as

one of the mortgages, subsequent to the assignment, may be affected by the rentals that have been or may be collected on the lease. (Alliance Trust Co. v. Hubbard, 669.)

See Tenancy in Common, 1.

Avoiding Mortgage for Fraud.

See Corporations, 4.

Reforming Mortgage in Foreclosure Suit.

See Reformation of Instruments, 1.

MOTHERS' PENSIONS.

See Infants, 1.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Ordinances—Validity.

1. A municipal ordinance directed against conspiracies to injure trade, business or commerce, and providing a penalty for violation thereof, has no extramural effect, is not invalid on the ground that it is not local, special and municipal legislation. (Hall v. Johnson, 21.)

Municipal Corporations—Ordinances—Rules of Evidence—Validity.

2. While the legislature may declare that certain evidentiary facts shall be *prima facie* evidence, such facts must have some direct and logical tendency to prove the antecedent fact, hence a municipal ordinance declaring that if any person shall alone, or in company with others, loiter or parade back and forth in front of or cause any other person or persons to loiter or parade back and forth in front of, or in the vicinity of, any store, factory, works or place of business, or in front of, or in the vicinity of, the home of any person connected with, employed in or seeking employment in any such store, etc., such conduct shall be *prima facie* evidence of a conspiracy to injure the trade, business or commerce of the proprietor of the store, etc., thus patrolled, is invalid, because the acts have no tendency to prove a conspiracy to injure the commerce or trade of any person. (Hall v. Johnson, 21.)

Municipal Corporations — Collection of Special Assessments — Sale of Land.

3. Under the Portland Charter, the city may collect a reassessment for a public improvement by a city treasurer's sale instead of enforcing the judgment confirming the reassessment by execution. (Elliott v. City of Portland, 47.)

Municipal Corporations — Assessment for Public Improvements — Interest.

4. Portland Charter, Section 400, authorizing reassessments for public improvements, provides that interest thereon, from the date of delinquency of the original assessment, may be added at the discretion of the council. Section 407 provides that the docket of city liens is a public writing, and that from the date of the entries therein of an assessment, the sum as entered is a tax levied and a lien upon the property, and that the sum entered shall be due and payable from the date of such entry, and if not paid within ten days shall be deemed

delinquent and bear interest at the legal rate. Section 401 provides that any person who has filed objections to a reassessment, which have not been satisfied by the council, may appeal to the Circuit Court. *Held*, that interest on a reassessment from the date of the delinquency of the original assessment cannot be collected, where the reassessment ordinance contains no provision for interest, and where an appeal is taken from the reassessment to the Circuit Court and then to the Supreme Court, the assessment does not bear interest until ten days after the judgment of the Circuit Court, confirming it, becomes final by the filing of the mandate from the Supreme Court. (Elliott v. City of Portland, 47.)

Municipal Corporations—Assessment for Public Improvements—Review.

5. An appeal to the Circuit Court, under Portland Charter, Section 401, from a reassessment for a public improvement, transfers the assessment proceeding, as to those parties who appeal, to the Circuit Court. (Elliott v. City of Portland, 47.)

Municipal Corporations—Assessment for Public Improvements—Sale—Costs and Expenses.

6. Where appeals were taken, under Portland Charter, Section 401, from a reassessment for a public improvement, the assessments against the property of those who appealed were not delinquent, while the appeals were pending, and no valid sale of the property could be made, though the property owners did not take measures to stay proceedings under the reassessment ordinance, and the cost of advertising the property on attempted sales could not be collected from the property owners under Section 412, providing that each piece of land shall be sold for a sum equal, but not exceeding the unpaid assessment, and the interest and cost of advertising and sale. (Elliott v. City of Portland, 47.)

Municipal Corporations—Assessment for Public Improvements—Cancellation of Illegal Items.

7. Where a city was about to sell property for the purpose of collecting a reassessment for a public improvement, and was claiming the right to collect interest and expenses, which it was not entitled to collect, the property owners had no remedy at law affording them adequate relief, and equity would lend its aid to cancel the illegal items on the docket of liens. (Elliott v. City of Portland, 47.)

Municipal Corporations—Ordinances Creating Misdemeanors.

8. A municipal enactment creating a misdemeanor can rise to no greater dignity or importance than a statute defining a crime of that class. (City of Astoria v. Malone, 88.)

Municipal Corporations—Discharge of Officers—Review.

9. Under Portland City Charter 1914, Chapter 4, Section 62, providing for suspending of city officers by the mayor, and Sections 98, 100, 101, 108, and 114, establishing a civil service board before whom an officer removed may demand a hearing, and giving the board power to subpoena and compel the attendance of witnesses, etc., and to reinstate officers or affirm dismissal, the board when so acting is a *quasi*-judicial tribunal, whose judgment and discretion will not be interfered with by the courts, but whose acts will be reviewed to see if they

conform to the provisions of the statutes conferring such power. (Crowe v. Albee, 148.)

Municipal Corporations—Officers—Civil Service Board—Hearing on Discharge.

10. The civil service board, upon hearing an appeal from officer dismissed, is confined to determination of the questions of the dismissal being for political or religious reasons, or whether in good faith for the improvement of the service, and the officer must sustain the burden of proof, under Portland City Charter 1914, Chapter 4, Section 108; and where, without written findings, a conclusion of law commuting the sentence of dismissal to suspension is made, it will be presumed the charges were sustained. (Crowe v. Albee, 148.)

Municipal Corporations—Civil Service Board—Review—Rehearing.

11. A civil service board acting as a *quasi*-judicial tribunal for determining whether an officer was properly removed cannot grant a rehearing, unless specifically authorized by law. (Crowe v. Albee, 148.)

Municipal Corporations—Automobile Collision—Last Clear Chance—Instruction.

12. In an action for injuries in collision between an automobile owned by defendants and the sled on which plaintiff was riding, where there was evidence tending to show that there were arc lights at the location extending for a short distance over the streets, that defendants' car had its side lights burning, and that there was considerable snow on the ground, the court properly instructed on the doctrine of last clear chance, since the circumstances might well be taken into consideration by the jury in determining whether or not defendants' chauffeur testified truthfully as to when he first discovered plaintiff and his sled. (Williams v. Lombard, 245.)

Municipal Corporations—Street Improvements—Jurisdiction.

13. Where plaintiffs deeded land to the public as a highway and the dedication was accepted by the County Court, and they later deeded an extension on condition that the county road should be vacated, and stood by without objection while the city improved the street, the city had jurisdiction to assess on the abutting land the cost of improving the street as a city and not a county road. (Grimes v. City of Seaside, 256.)

Municipal Corporations — Street Improvements — Specifications — Patented Article.

14. The city does not, by specifying patented paving, make an illegal contract, where the owner of the patent offers to permit its use on reasonable terms by any other person. (Grimes v. City of Seaside, 256.)

Municipal Corporations — Street Improvements — Lien Dockets — Sufficiency.

15. Where the lien docket showed the names of persons, the description of the land and the amount of the assessment and the manner and time for its payment, it was sufficient, although it did not expressly state that the persons named were severally the owners of

the real property, nor that the sums named after the description of land were the amounts respectively imposed upon the lands described. (Grimes v. City of Seaside, 256.)

Municipal Corporations—Street Improvements—Lien—Foreclosure.

16. Under Seaside Charter, empowering the city to sue for the cost of improvement and to have a lien therefor decreed on the premises, the city was authorized to have a foreclosure of a lien of a special assessment for paving street. (Grimes v. City of Seaside, 256.)

Municipal Corporations—Collection of Special Assessments.

17. Under the Portland Charter, it was proper for the Circuit Court, on appeal in sewer construction reassessment proceedings, to direct that a certified copy of the judgment for the city be sent to the city auditor for enforcement by the city of the liens adjudged. (City of Portland v. Blue, 271.)

Municipal Corporations—Streets—Power to Vacate.

18. Charter of Eugene (Sp. Laws 1905, p. 254), Section 48, subdivision 36, provides for the vacation of any street or alley upon the petition or with the consent of not less than three fourths of the owners of property adjoining or abutting thereon, and the passage of an ordinance providing for improvement of a 90-foot street as a 70-foot street, without such petition or consent, could not have the effect of vacating any portion of the street. (City of Eugene v. Garrett, 435.)

Municipal Corporations — Abandonment of Street — Acts of Public Officers.

19. Where the board of regents of the University relied upon a decree quieting title and registering land which they purchased for the state, and upon an agreement they had with the city by which the latter secured the use of sufficient area to make a 70-foot street along certain land, the city could not go beyond such agreement and appropriate land belonging to the state. (City of Eugene v. Garrett, 435.)

Municipal Corporations—Streets—Constructive Occupation.

20. Possession and user of a part of width of a street within the limits of the duly recorded dedication amounts constructively to an occupation of its entire dedicated width, and is possession sufficient for the purposes of a suit to establish the city's claim to the whole street. (City of Eugene v. Garrett, 435.)

Municipal Corporations—Streets—Obstructions—Removal.

21. A city, as trustee of streets for the use of the public, is in duty bound to remove all obstructions and encroachments which materially disturb the public user by whatever adequate, legal, or equitable means seem best. (City of Eugene v. Garrett, 435.)

Municipal Corporations—Streets—Obstructions—Abatement and Injunction.

22. Section 341, L. O. L., providing for abatement of nuisances, is not conclusive and may not be an appropriate remedy for removal of street obstructions, in a dispute between lot owners and the city, but where a public nuisance will cause irreparable damage or require

numerous actions, equity has jurisdiction by way of the more efficacious remedy of injunction. (City of Eugene v. Garrett, 435.)

Municipal Corporations — Public Improvements — Assessments — Restraining Collection—Grounds.

23. Ordinarily a court of equity will not interfere to restrain the collection of a special assessment for municipal improvements in cases of mere illegality or irregularity, but its jurisdiction is confined to cases where the tax is not authorized by law, or is assessed on property not subject to taxation, or by persons without authority. (Wilson v. City of Portland, 507.)

Municipal Corporations—Public Improvements—Special Assessments.

24. Portland City Charter, Section 397, relating to assessment for street improvements, declares that no assessment shall be held invalid by reason of mistakes, delays, errors, or irregularities in any act or proceeding in the improvements of a street. Section 400 declares that, whenever an assessment for the improvement of any street shall be annulled, or when the council shall be in doubt as to the validity of any such assessment, the council may by ordinance make a new assessment or reassessment on the land benefited by such improvement. Plaintiff, the owner of property abutting on a street, sought to have set aside as a cloud on his title the lien of a special assessment on the ground that, when the proceedings for the improvement were initiated, the street had already been paved, and that thereafter no other pavement had been constructed. *Held* that, without any showing that the city was not ordering reassessment for improvements already made, plaintiff was not entitled to any relief, it seeming that he was seeking to avoid assessments for improvements already constructed, and hence a decree on pleadings in favor of plaintiff, whose complaint alleged the foregoing acts, was erroneous, particularly as the city's answer alleged that the assessment was a reassessment on account of omissions in the first; for equity will not interfere to restrain the collection of an assessment for mere illegality or irregularity. (Wilson v. City of Portland, 507.)

Municipal Corporations — Street Improvements — Reassessment — Amendment of Jurisdictional Defects in Ordinances.

25. Under Portland City Charter, Section 400, all manner of errors and irregularities in ordinances for assessment of street improvements may be corrected whether jurisdictional or otherwise, and a reassessment made for pavement already laid. (Wilson v. City of Portland, 507.)

Municipal Corporations — Street Assessments — Freeholder's Right to be Heard.

26. Under such charter provision, a freeholder of Portland should make his objection to street improvements in the beginning, since it is never too late for the city to amend a defect in ordinance for assessment therefor, provided only that somewhere the freeholder has had opportunity to be heard before his property is taken for payment of the tax. (Wilson v. City of Portland, 507.)

Municipal Corporations—Bond of City Treasurer—Essentials.

27. A bond of a city treasurer, providing that the surety shall make good any loss sustained by the city by any act of fraud or dishonesty of the treasurer amounting to larceny, was sufficient; it not being

necessary to detail in the bond the treasurer's duties fixed by law. (City of Seaside v. Oregon Surety & Casualty Co., 624.)

Municipal Corporations—Bond of City Treasurer—Larceny.

28. That the money appropriated by the city treasurer to his own use passed through the vaults of a bank of which he was cashier did not render the funds not a subject of larceny within his official bond securing against larceny. (City of Seaside v. Oregon Surety & Casualty Co., 624.)

Municipal Corporations—Treasurer's Bond—"Larceny."

29. A bond of a city treasurer, agreeing to make good any loss sustained by the city by any act of fraud or dishonesty of the treasurer amounting to "larceny," included larceny as defined by Section 1957, L. O. L., as to conversion of public money. (City of Seaside v. Oregon Surety & Casualty Co., 624.)

Municipal Corporations—Authority of Municipality—Charter.

30. The powers of a municipality are not necessarily restricted to those expressed in its charter, and a municipality may rely on the general statutes applicable to all municipalities enacted prior to the grant of its charter. (City of Grants Pass v. Rogue River Pub. Service Corp., 637.)

Municipal Corporations—Charter—Constitutional Provisions.

31. Those constitutional provisions (Article XI, Section 2) adopted June 4, 1906, forbidding the legislature to enact, amend or repeal any charter or act of incorporation for any municipality or town, do not apply to a municipal corporation already chartered, and which under existing laws was entitled to exercise enumerated privileges. (City of Grants Pass v. Rogue River Pub. Service Corp., 637.)

Municipal Corporations—County Roads—Jurisdiction of County Court —Exclusion of Interference by City—Statutes.

32. Under Laws of 1917, page 588, Section 2, and page 613, Sections 2, 5, 7, 10 and 24, relating to county roads, control thereof, and taxation therefor, a County Court has exclusive jurisdiction over all county roads within the county, necessarily excluding the right of every municipal corporation through whose limits such highways extend from interfering therewith, and neither a city nor its officers can superintend the outlay of any money raised by municipal taxation for maintenance of streets, etc., in improving a county road within its borders. (Cooper v. Fox, 657.)

Municipal Corporations—Sidewalks—Negligence.

33. To constitute negligence predicated on violation of a city ordinance by abutting property owner, there must first be a duty owing by defendant to plaintiff. (Smith v. Meier & Frank Inv. Co., 683.)

Municipal Corporations—Sidewalks—Negligence.

34. Under Portland ordinance, requiring property owners to remove snow from sidewalks, and imposing penalty for failure to do so, where defendant failed to remove snow and ice during period of alternate thawing and freezing weather, and plaintiff fell and was injured, the violation of the ordinance, without any affirmative act against plaintiff, did not imply a cause of action in his favor, and he could not sue

as a relator in the city's name. (Smith v. Meier & Frank Inv. Co., 683.)

Municipal Corporations—Sidewalks—Negligence.

35. Portland City Charter, Section 398, making abutting owners liable civilly to pedestrians injured by defects in sidewalks, does not impliedly raise cause of action in favor of pedestrian, who fell on walk from which the owner had failed to remove snow and ice, in violation of city ordinance imposing penalty therefor. (Smith v. Meier & Frank Inv. Co., 683.)

See Damages, 8.

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See Carriers, 1.
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NEW TRIAL.

New Trial—Authority of Court—Error of Law.

1. Under Article VII, Section 3, of the Constitution, as amended, declaring that in actions at law where the value in controversy shall exceed $20 the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court unless the court can affirmatively say there is no evidence to support the verdict, the trial court has authority on its own motion to grant a new trial on account of errors in instructions submitting the cause to the jury, even though no exception was taken. (Archambeau v. Edmunson, 476.)

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See Master and Servant, 1–6.

PLEADING.

Pleading—Inconsistent Defenses—Election.

1. In action for possession or value of machine sold under conditional contract and resold by vendee, defenses that vendee bought on consignment, and that he was agent with right to collect, were inconsistent with a third defense that the sale was unconditional and without reservation, and defendant was properly required to elect. (Pelton v. Water Wheel Co. v. Oregon Iron Co., 248.)

Pleading—Judgment—Answer.

2. Where there was traversed matter in defendant's answer strongly appealing to court of equity against granting plaintiff any relief, the sustaining of plaintiff's motion for decree on the pleadings was error. (Wilson v. City of Portland, 501.)

See Animals, 1.
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See Elliott v. City of Portland, 47.
See City of Portland v. Blue, 271.
See Smith v. Meier & Frank Inv. Co., 683.
See Wilson v. City of Portland, 507.

PRESUMPTIONS.

See Appeal and Error, 12, 14.
See Attorney and Client, 2.
See Courts, 3, 4.
See Evidence, 1, 3, 4.

Presumption as to Grantees in Deed.

See Appeal and Error, 27.

Presumption as to Continuance of Situation.

See Evidence, 13.

PRINCIPAL AND AGENT.

Principal and Agent—Unauthorized Acts of Agent—Silence of Principal—Ratification.

1. Where unauthorized contract of agent is brought to the knowledge of the principal, either orally or by letter, the principal must hastily disavow it or he will be held to have ratified it, and particularly so if the failure to do so might impose loss or injury upon the other party. (Depot Realty Syndicate v. Enterprise Brewing Co., 560.)

Principal and Agent—"Ratification" of Contract—"Estoppel in Pais."

2. A clear distinction exists between ratification of contract by a principal and estoppel *in pais;* ratification following the unauthorized act, and estoppel being based on principal's inducement to another to act to his prejudice. (Depot Realty Syndicate v. Enterprise Brewing Co., 560.)

PRINCIPAL AND SURETY.

See Subrogation, 1, 2.

PRIORITY.

See Chattel Mortgages, 1, 2.

PROBATE.

Setting Aside Probate of Wills.

See Wills, 3–6.

PROCESS.

Insufficient Service of Summons.

See Justices of the Peace, 2.

PROHIBITION.

Nature of Acts Which can be Prohibited.

See Criminal Law, 1.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, 4–7, 23–26.

PUBLIC NUISANCE.

See Nuisance.

QUANTUM MERUIT.

See Master and Servant, 12.

QUESTION FOR JURY.

See Appeal and Error, 8.
See Carriers, 3.
See Deeds, 4.
See Highways, 3, 5.
See Insurance, 7.
See Master and Servant, 13.

QUIETING TITLE.

Quieting Title—Title of Plaintiff—Necessity of Title.

1. In a suit by one claiming under a sheriff's deed to remove clouds from his title, where defendants pleaded the judgment under which the sale was made and did not allege that it was a nullity or that the sheriff's sale was void, but, on the contrary, relied thereon claiming that the transaction whereby plaintiff acquired title was a redemption from that judgment, but plaintiff, instead of relying on the pleadings, offered the entire record from the commencement of the action to the execution and delivery of the sheriff's deed, he was not entitled to a decree establishing his title if the sheriff's deed was thereby shown to be void, since, having chosen to offer evidence of his alleged title, he must rely upon the strength of his own title. (Murphy v. Bjelik, 329.)

Quieting Title—Evidence—Burden of Proof.

2. Where, in a suit to remove clouds, plaintiff claims to own the land and each of the defendants claim to have a lien thereon, each party has the burden of proving his claim. (Murphy v. Bjelik, 329.)

RAILROADS.

Railroads—Right of Way—Covenant Running With Land—Basis in Inference.

1. In the absence of any evidence in relation to whether rights of the grantor of land to a railway to have two wagon road crossings maintained ran with the land, or were anything more than personal covenants, the reference, in the reservation of his deed, to a county road, might create an inference that the designated highway was *in esse*, a part of the land, so that the railway was required to perform the terms of its agreement in favor of the grantor's assigns

without express words to that effect. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Railroads—Right of Way—Land Owners' Right to Cross.

2. In suit by a railway against land owners to enjoin interference with its right of way and to quiet title, the trial court properly restricted the right of the land owners to the private crossing of the track to be made and maintained by them at the place designated by them in their latest conveyance to the railway's predecessor, where no right to cross any part of the premises elsewhere could possibly be found in their favor by the most liberal construction of the two grants, when read together. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Railroads—Injuries to Person—Climbing Between Cars—Discovered Peril.

3. Evidence *held* sufficient to support a finding that defendant railroad knew that plaintiff was climbing through between freight-cars when it was starting the train, and could have avoided the injury. (Provo v. Spokane, P. & S. Ry. Co., 467.)

Railroads—Starting of Train—Discovered Peril—Knowledge of Employee.

4. Where plaintiff was climbing between freight-cars, and was injured by the first start of the train, to recover for discovered peril, it is necessary that the engineer, fireman, or the brakeman giving the signal to start knew of his perilous position; it not being sufficient that some other brakeman or employee knew of his being between the cars. (Provo v. Spokane, P. & S. Ry. Co., 467.)

Railroads—Injuries to Person Between Cars—Misleading Instructions.

5. Where plaintiff was injured between freight-cars by first movement of starting train, an instruction that if employees in charge of the freight "or" engaged in assisting in directing its movement knew of his peril, to find for plaintiff was misleading, because of the word "or," as the jury might have applied the doctrine of discovered peril if any trainman knew of plaintiff's position. (Provo v. Spokane, P. & S. Ry. Co., 467.)

RATIFICATION.

See Corporations, 8.
See Fraudulent Conveyances, 3.
See Principal and Agent, 1, 2.

REASSESSMENT.

See Municipal Corporations, 25.
See Trial, 2.

RECEIVERS.

Receivers—Authority.

1. A hotel receiver had authority to make purchases of supplies which would have been a necessary expense, even if there had been no receivership. (Henderson v. Tillamook Hotel Co., 74.)

Receivers—Accounting.

2. A hotel receiver was entitled to credit for payments for supplies purchased, whether the merchants so paid applied the payments to the

receiver's accounts for such supplies, or to prior unpaid balances of the hotel company, since both accounts were obligations of the hotel company. (Henderson v. Tillamook Hotel Co., 74.)

See Appeal and Error, 2, 29.
See Mortgages, 3.

RECORD.

See Appeal and Error, 5.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—Mortgages—Foreclosure.

1. A mortgage given as security for an accommodation "note to F. and B.," whereas the note was in favor of W. O., executed at the F. and B. Bank, evidencing a loan made through the good offices of the bank, could be reformed in a foreclosure against the accommodated party. (Webster v. Rogers, 547.)

RELATIVE RIGHTS.

Determination of Relative Rights to Water.

See Waters and Watercourses, 2.

REPEAL.

See Statutes, 2.

RESCISSION.

See Landlord and Tenant, 1.
See Vendor and Purchaser, 3–7.

RES JUDICATA.

See Judgment, 10, 11.

REVIEW.

See Appeal and Error, 6, 8, 19, 21, 24, 26.
See Municipal Corporations, 5, 9, 11, 17, 18.
See Taxation, 1, 2, 4.

REVOCATION.

Of Will by Execution of Subsequent Lost Will.

See Wills, 5, 6.

REWARDS.

Rewards—Persons Entitled—Evidence.

1. In such suit of interpleader, evidence *held* insufficient to show fraud and collusion on the part of the contestants submitting the best solutions, though they were related, their method of procedure was substantially the same, and their results only slightly variant. (Statesman Pub. Co. v. Foltin, 65.)

RIGHT OF WAY.

See Railroads, 1, 2.

SALES.

Sales—Action for Price—Affirmative Denial.

1. In action for hay sold, a denial that more than a certain part of the hay was delivered, and an affirmative allegation that plaintiffs failed to deliver the balance of the hay contracted for, amounted to no more than an affirmative denial, and not pleading, as a counterclaim or defense, damages occasioned by breach of the contract to deliver all the hay. (Stillwell v. Hill, 112.)

Sales—Damages.

2. The measure of damages for the breach of an executory contract for the sale and delivery of personal property is the difference between the contract price and the market value at the time and place of delivery, or within a reasonable length of time thereafter. (Stillwell v. Hill, 112.)

Sales—Damages.

3. The rule limiting damages for nondelivery of hay contracted for to the difference between the contract price and the market price at the time and place of delivery would not be affected by the sellers' further failure, under the contract, to furnish a feeding place for the purchasers' stock, necessitating buying hay at or transporting it to another place, since these would be separate elements of damage. (Stillwell v. Hill, 112.)

Sales—Conditional Sales—Duty of Seller to Collect—Subsequent Vendees.

4. Where a machine was made to order and title reserved in plaintiff and vendee resold, the question of suretyship did not arise so as to require any effort on part of plaintiff to collect from the vendee, but plaintiff could depend solely on the subsequent purchaser, and not file claims in a bankruptcy proceeding of the conditional vendee. (Pelton Water Wheel Co. v. Oregon Iron Co., 248.)

Sales—Conditional Sales—Purchaser from Conditional Vendee—Rights.

5. A conditional vendee of a machine cannot pass title to even a *bona fide* purchaser, but he can pass a defeasible interest, and the subsequent purchaser can make his title absolute by complying with the terms of the contract. (Pelton Water Wheel Co. v. Oregon Iron Co., 248.)

Sales—Conditional Sales—Payment—Acceptance of Notes.

6. Under a conditional contract of sale of a machine providing that the title shall not pass until payment, "including deferred payments and notes or renewals thereof," the taking of promissory notes for the amount due would not be a payment, unless so agreed and understood. (Pelton Water Wheel Co. v. Oregon Iron Co., 248.)

Sales—Conditional Sales—Machine Affixed to Realty—Bona Fide Purchasers—Burden of Proof.

7. The burden is on a purchaser from a conditional vendee of a machine affixed to the realty of such vendee, to show that he is a *bona fide* innocent third party. (Pelton Water Wheel Co. v. Oregon Iron Co., 248.)

Sales—Conditional Sales—Affixing to Realty—Subsequent Bona Fide Purchaser—Pleading.

8. One cannot claim that he is a *bona fide* innocent purchaser of a machine affixed to realty, his seller being a conditional vendee, where the theory of defense was that there was no conditional sale, or that the conditional vendee was the agent of the plaintiff. (Pelton Water Wheel Co. v. Oregon Iron Co., 248.)

SCHOOLS AND SCHOOL DISTRICTS.

Schools and School Districts—Liability on Contractor's Bonds.

1. Under Section 6266, L. O. L., as amended by Laws of 1913, page 59, providing that any person contracting with a school district, etc., for the construction of any buildings, etc., shall be required to execute the usual penal bond with the additional obligations that the contractor shall promptly make payments to all persons supplying labor or materials to the contractor for use in the prosecution of the work, the statute must be read as part of an undertaking made to fulfill the requirements of the law, and the effect of the undertaking is an express agreement by the surety to pay materialmen whose claims are not liquidated by the contractor. (School Dist. No. 30 v. Alameda Constr. Co., 132.)

Schools and School Districts—Action on Contractor's Bond—Sham Denials.

2. In a suit on the bond of one contracting with a school district for the construction of a schoolhouse, where the surety's answer admitted the execution of the bond, but denied that it agreed to pay anyone except the school district, such denial was sham in effect, and left uncontroverted the allegation of the complaint that the surety obligated itself by such bond to pay persons furnishing labor or material in case the contractor failed to do so, in view of Section 6266, L. O. L., as amended by Laws of 1913, page 59, providing that the surety shall be liable to all persons supplying labor or materials. (School Dist. No. 30 v. Alameda Constr. Co., 132.)

Schools and School Districts—Liability on Contractor's Bonds.

3. Under Section 6266, L. O. L., as amended by Laws of 1913, page 59, the bond given by one contracting with a school district for the construction of a school building has a double obligatory aspect, and the surety's liability thereunder to laborers or materialmen is not affected by changes in the contract after its execution and delivery not attributable to such laborers or materialmen. (School Dist. No. 30 v. Alameda Constr. Co., 132.)

Schools and School Districts—Contracts—Actions on Bonds—Variance.

4. Where, in an action on the bond of one contracting with a school district for the construction of a schoolhouse, the surety in its answer admitted that the contract was entered into and the bond given, and alleged that alterations were made after the execution of the contract without its knowledge, increasing its obligation, evidence was not admissible of such changes before the execution of the contract, but after it had signed the bond. (School Dist. No. 30 v. Alameda Constr. Co., 132.)

SEASIDE, CHARTER OF.

See Grimes v. City of Seaside, 256.

SECONDARY EVIDENCE.

See Evidence, 11.

SETOFF.

One Judgment Against Another.

See Justices of the Peace, 1.

SETOFF AND COUNTERCLAIM.

Setoff and Counterclaim—Setoff of Partners' Claims.

1. Notwithstanding the rule against setoff of partnership demands and demands due to individual partners, where all the partners agree with an individual that a setoff may be allowed, the stipulation will be enforced. (Barnes v. Esch, 1.)

Setoff and Counterclaim—Setoff of Wife's Claim Against Judgment Against Husband.

2. Notwithstanding a wife's natural interest in protecting her husband's rights, the requirement of mutuality of demands prevents her being allowed to offset her claim for damages against a judgment against her husband to which she was not a party, even though the judgment creditor is insolvent and a nonresident of the state. (Barnes v. Esch, 1.)

Setoff and Counterclaim—Capacity in Which Defendant Holds.

3. A lawful setoff must be based on a claim held by defendant in the same right as that in which he is sued. (Sanford v. Pike, 614.)

Setoff and Counterclaim—Setoff by Trustee—Illegality.

4. An agreement between a trustee and the bank, which had a deposit of his individual funds and the funds of his beneficiaries, that a claim of the trustee as such be set off against a claim against him in his individual capacity would be unlawful, in the absence of consent by the *cestuis que trustent*. (Sanford v. Pike, 614.)

Setoff and Counterclaim—Claim in Favor of One Partner—Setoff Against Firm.

5. A claim in favor of one partner cannot be set off against a partnership obligation, in the absence of agreement by all parties that the setoff shall be available. (Sanford v. Pike, 614.)

Setoff and Counterclaim—Claims in Which Others are Interested.

6. A fund constituting an asset in which others than defendants are interested, and rights in which have not been segregated, cannot be used by way of setoff. (Sanford v. Pike, 614.)

SIDEWALKS.

See Municipal Corporations, 33–35.

SILENCE.

See Corporations, 8.
See Estoppel, 1.
See Principal and Agent, 1.

SPECIAL INTERROGATORIES.

See Trial, 7–10.

SPECIAL PRIVILEGES.

See Constitutional Law, 2.

STATES.

States—Contracts—Right of Surety to Fulfill Contract.

1. It was the manifest right of the surety of a contractor to install plumbing in certain buildings for the state to fulfill the contract on its principal's default. (Derby v. United States etc. Co., 34.)

States—Surety for Contractor With State—Performance of Contract on Principal's Default—Right to Settle Accounts With State Auditor—Statute.

2. When a contractor with the state to install plumbing in buildings abandoned the work and his surety took his place and performed, the surety was entitled to settle its accounts and liability under the contracts and bonds with the state through its constitutional auditor, the Secretary of State, pursuant to Laws of 1913, page 607, prescribing such officer's duties with relation to the examination and determination of claims. (Derby v. United States etc. Co., 34.)

States—Surety on Contract With State—Application for Settlement After Performance—Right of Secretary of State.

3. When the surety of a contractor with the state to install plumbing in its buildings had finished the work on the contractor's default, and applied to the Secretary of State for settlement, he had a right to inquire, not only whether the surety had finished the work, but had complied with its bonds and paid persons supplying the contractor with labor and material for which they had not been paid. (Derby v. United States etc. Co., 34.)

States—Decision of Auditor—Absence of Evidence to Controvert.

4. The decision of the state's auditing officer, the Secretary of State, as to the correctness of the claim of the surety for a contractor with the state which has performed on the contractor's default, is only *prima facie* correct, and may be disputed; but, where nothing appears to controvert the auditor's decision, it must control, it not being enough to cast doubts on the oral testimony by mere cross-examination. (Derby v. United States etc. Co., 34.)

STATUTE OF FRAUDS.

Frauds, Statute of—Good Contract.

1. Whatever would be a good contract under the law of contract in the absence of the statute of frauds is a good contract in the presence of the statute, providing only that it complies therewith by being in writing and expressing the consideration. (The Oregon Home Builders v. Crowley, 517.)

Frauds, Statute of—Requirements of Writing.

2. A writing, to satisfy the statute of frauds, Section 808, L. O. L., must show the contracting parties, intelligently identify the subject matter, disclose the terms and condition of the agreement, express the consideration, and be signed by the party to be charged. (The Oregon Home Builders v. Crowley, 517.)

See Brokers, 7–13.

STATUTES.

Statutes—Exceptions and Provisos—"Enacting Clause"—"Preamble."

1. The term "enacting clause" generally relates to a requirement in a Constitution or municipal charter demanding the use of a designated clause so as to give validity to a statute or ordinance, and what is generally designated the "enacting clause" of a statute is occasionally called the "preamble"; while a section of a statute denouncing an offense is sometimes spoken of as the "enacting clause." (City of Astoria v. Malone, 88.)

Statutes—Repeal—Constitutional Provision.

2. Article IV, Section 20, of the Constitution, declares that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be embraced in the title, but that if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to that subject. Act Feb. 28, 1913 (Laws 1913, p. 689), is entitled, "An act to provide for the organization and incorporation of cities and towns and to legalize such corporations as heretofore have attempted to be incorporated under Chapter 1 of Title XXVI of Lord's Oregon Laws, and are now exercising the functions of incorporated cities and towns under such attempted incorporation." Section 11 of the act expressly repealed Title 26, L. O. L. *Held*, that as the caption of the act of 1913 did not mention the repeal of any existing laws, and did not suggest any attempt to repeal any law or curtail the established privileges of any city or town, the attempted repeal of Title 26, L. O. L., was ineffective, save in so far as a change in procedure for incorporation of municipalities might work an implied repeal, and hence Sections 3211, 3229, giving privileges to municipalities, which were part of Title 26, were not repealed. (City of Grants Pass v. Rogue River Pub. Service Corp., 637.)

Statutes—Common Law.

3. Statutes in derogation of the common law must be construed strictly. (Smith v. Meier & Frank Inv. Co., 683.)

See Chattel Mortgages, 1, 2.
See Constitutional Law, 2.
See Counties, 1.
See Election of Remedies, 2.
See Evidence, 1–3, 11.
See Fraudulent Conveyances 2, 3.
See Highways, 9.
See Homestead, 1–3.
See Intoxicating Liquors, 1–3.
See Justices of the Peace, 1.
See Municipal Corporations, 32.
See States, 2.
See Waters and Watercourses, 1.

Necessity of Compliance With Statute in Attachment.

See Attachment, 1.

STAY.

See Appeal and Error, 7.
See Equity, 7.

STOCK.

Sale of Corporation Stock for an Illegal Assessment.

See Constitutional Law, 3, 4.
See Corporations, 6.
See Injunction, 7.

STREET IMPROVEMENTS.

See Municipal Corporations, 13–16, 25.

STREETS.

See Contracts, 4.
See Dedication, 1.
See Municipal Corporations, 18–22.

SUBROGATION.

Subrogation—Surety—Privity of Contract.

1. There was no privity of contract between a bank lending money to a contractor with the state to install plumbing in its buildings and the state, as there was between the contractor's surety and the state; the bank having no right, like the surety, to finish the work on the contractor's default with the resulting right of subrogation. (Derby v. United States etc. Co., 34.)

Subrogation—Right of Surety to Perform on Principal's Default—Effect—Exclusion of General Creditor.

2. On account of the elementary right of the surety of a contractor with the state to install plumbing in buildings to perform the contract on the contractor's default, when it did so it was entitled to all the benefits coming to the contractor under the contract, and to be subrogated to all the rights of the state respecting reserve percentages as a lever with which to enforce performance; all to the exclusion of a bank and general creditor. (Derby v. United States etc. Co., 34.)

SUMMONS.

Insufficient Service of Summons.

See Justices of the Peace, 2.

TAXATION.

Taxation—Correction of Assessment—Review by Courts — Evidence.

1. On an appeal to the Circuit Court from the refusal of the board of equalization to reduce an assessment of several hundred lots, evidence *held* insufficient to show error on the part of the assessor in valuing the lots. (Douglas Land Co. v. Clatsop County, 462.)

Taxation—Correction of Assessment—Review by Courts—Burden of Proof.

2. Under Section 3613, L. O. L., as amended by Laws of 1913, page 329, providing that a taxpayer aggrieved by the assessment of his property and denied relief by the board of equalization may appeal to the Circuit Court, the burden is on the property owner on an appeal to the Circuit Court to show error on the part of the assessor. (Douglas Land Co. v. Clatsop County, 462.)

Taxation—Correction of Assessment—Evidence—Offer to Sell Property.

3. While offers to sell property at stated prices are properly received as admissions against the party making the offers, they are not admissible on his behalf on an appeal to the Circuit Court from the refusal of the board of equalization to reduce an assessment. (Douglas Land Co. v. Clatsop County, 462.)

Taxation—Correction of Assessment—Review by Court—Extent of Review.

4. On appeal to the Circuit Court from the refusal of the board of equalization to reduce an assessment under Section 3613, L. O. L., as amended by Laws of 1913, page 329, an issue as to the illegality of the assessment because made by deputy assessors cannot be determined, especially where there are no allegations on which to try out the legality of the assessments, and where the only assignment of error on appeal is that the Circuit Court erred in dismissing the petition and in holding that the property described was assessed at its true cash value. (Douglas Land Co. v. Clatsop County, 462.)

Invalid Special Road Tax.

See Highways, 8.

TENANCY IN COMMON.

Tenancy in Common—Mortgage by One to Another—Who may Purchase at Foreclosure.

1. Where a tenant in common mortgages his interest to another tenant in common, the latter can buy at a foreclosure sale. (Webster v. Rogers, 547.)

Tenancy in Common—Buying Interest of Another at Judicial Sale.

2. A tenant in common can buy the interest of another tenant at a public sale under execution without being charged as a trustee for such tenant, although he would be a trustee if he bought an outstanding hostile title. (Webster v. Rogers, 547.)

Tenancy in Common — Judicial Sales — Adequacy of Consideration — Evidence.

3. Evidence *held* to warrant a finding that a tenant in common did not buy the interest of another tenant at a judicial sale at an inadequate price. (Webster v. Rogers, 547.)

TENDER.

See Mortgages, 5.

TESTAMENTARY CAPACITY.

See Wills, 1, 2.

TIME.

See Equity, 5.

In Which to Secure Rescission of Contract.

See Vendor and Purchaser, 5.

To Give Notice of Injury Under Accident Policy.

See Insurance, 5.

In Which to Sue Under Accident Policy.
See Insurance, 9.

TITLE.

See Mortgages, 2.
See Quieting Title, 1, 2.
See Vendor and Purchaser, 2.

TRESPASS.

Trespass—What Constitutes—Cutting Timber.

1. It is not a trespass for a railroad to whom a right of way is granted to cut shrubs along the right of way, with permission of the abutting owners. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

Trespass—Damages—Measure.

2. Where railroad cut brush along right of way and left it upon the abutting owner's land, her remedy was the expense reasonably to be incurred in removing it, and not the damages which might result from inability to use the land for agricultural purposes. (Oregon-Wash. R. & N. Co. v. Reed, 398.)

See Injunction, 1–6.

TRIAL.

Trial—Direction of Verdict—Uncontradicted Evidence.

1. In an attorney's action for compensation, where there was no counterclaim and no dispute in material testimony, and there could reasonably be no difference of opinion as to inferences deducible from the evidence, a directed verdict was proper. (Smith v. Robinson, 100.)

Trial—Reassessment Proceedings—Verdict.

2. In sewer construction reassessment proceedings, appealed to Circuit Court, a verdict for plaintiff, assessing benefits to defendants' property "the same as is set forth in" a city ordinance, which was in evidence, was not too indefinite, under the rule of liberal construction of verdicts. (City of Portland v. Blue, 271.)

Trial—Reception of Evidence.

3. Where the complaint failed to state facts sufficient to constitute a cause of action, and the affirmative matter in reply was material only as tending to rebut the counterclaim pleaded in the answer, testimony in support of the reply could be received only in rebuttal, and it was not error to reject it as part of plaintiff's case in chief. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Trial—Offer of Proof—Sufficiency.

4. An offer of proof of certain facts upon which plaintiff relied, without naming witnesses or stating the testimony expected to be elicited from them, was insufficient. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Trial—Offer of Proof—Sufficiency.

5. An offer of proof should state facts, not conclusions, and its language should be distinct and specific and not vague or general; and it is not sufficient that it state the ultimate facts in language appropriate to a pleading, but it must set out the evidentiary facts. (Columbia Realty Inv. Co. v. Alameda Land Co., 277.)

Trial—Instructions—Curing Error.

6. Where an instruction which would have permitted recovery for discovered peril for injuries incurred by the first movement of a train in starting if any of the trainmen knew of his peril was repeated twice, and several other instructions required unqualifiedly that recovery be had if defendant had knowledge of his peril, such instruction was not cured by a proper instruction in the charge, especially where the evidence would warrant a finding that an employee not starting or signaling the train to start was the only one knowing of plaintiff's peril. (Provo v. Spokane, P. & S. Ry. Co., 467.)

Trial—Special Interrogatories—Defects.

7. Objections to the form of special interrogatories submitted are waived where, prior to submission, they were not called to the court's attention. (Archambeau v. Edmunson, 476.)

Trial—Special Interrogatories—Objections.

8. A special interrogatory should not submit to the jury a question calling for a conclusion of law, and, in order to sanction judgment, a special verdict should contain statements of ultimate facts. (Archambeau v. Edmunson, 476.)

Trial—Special Interrogatories—Objections—Waiver.

9. Where the court's attention was not called to any defect of form, a special interrogatory submitting to the jury the question whether a contract for the sale of land was delivered is not open to objection on the ground that it called for determination of the ultimate fact of delivery instead of the evidentiary facts from which that fact was to be deduced. (Archambeau v. Edmunson, 476.)

Trial—Special Findings—Conflicts.

10. Under Section 155, L. O. L., special findings by the jury will, where conflicting with the general verdict, control. (Archambeau v. Edmunson, 476.)

Trial—Instructions—"Execution of Writing."

11. In an action for damages for breach of a contract to convey land, an instruction that before the contract could be binding on defendants there must be an execution and delivery, and if there was no delivery or if there was an unauthorized delivery there could be no recovery, is, under section 777, L. O. L., declaring that the execution of a writing is the subscribing and delivering, erroneous; there being no attempt in the instructions to define or explain what in law constitutes the delivery of a writing. (Archambeau v. Edmunson, 476.)

Trial—Carriage of Passengers—Instructions.

12. In a personal injury action by passenger on street-car the refusal of instruction on contributory negligence which was not pleaded was not error, the jury being plainly charged so that they must have understood that there could be no recovery unless street railroad company was negligent and its negligence was the proximate cause of the injury. (Adams v. Portland Ry. L. & P. Co., 602.)

TRUSTEE.

Rights of Trustee Against Bankrupt's Surety.

See Bankruptcy, 1, 2.

Illegality of Setoff by Trustee.
See Setoff and Counterclaim, 4.

Right of Trustee to Beneficiaries' Funds.
See Trusts, 1.

TRUSTS.

Trusts—Right of Trustee to Beneficiaries' Funds—Evidence.

1. If a trustee who opened a bank account with his beneficiaries' funds thereafter is to be entitled to treat the funds as his own, he must establish his right to them by unequivocal proof. (Sanford v. Pike, 614.)

UNITED STATES STATUTES.

Cited and Construed in this Volume.
See Table in Front of this Volume.

USURY.

Usury—Persons Entitled to Take Advantage.

1. Even if the notes secured by a mortgage be usurious, this cannot, to the extent of the principal, avail a subsequent judgment creditor of the mortgagor; the debt without interest being under Section 6030, L. O. L., payable to the state for the school fund, and the mortgage being a mere incident of the debt. (Brayton & Lawbaugh v. Monarch Lum. Co., 365.)

Usury—Forfeiture—Suit for Determination.

2. The suit in which under Section 6030, L. O. L., it can be determined that mortgage notes are usurious, and the principal payable to the state for the school fund, is one on the mortgage or notes. (Brayton & Lawbaugh v. Monarch Lum. Co., 365.)

VACATION.

See Contracts, 4.
See Evidence, 9.
See Municipal Corporations, 18.

VARIANCE.

See Master and Servant, 12.
See Schools and School Districts, 4.

VENDOR AND PURCHASER.

Vendor and Purchaser—Fraud—Evidence—Sufficiency.

1. Evidence *held* insufficient to show fraud on the part of defendants who contracted to convey land to plaintiff. (Hornbeck v. Smith, 78.)

Vendor and Purchaser—Title—Encumbrances—Public Highway.

2. The existence of a visible and known physical encumbrance upon land contracted to be conveyed, such as a public highway, is not such an encumbrance as renders the owner's title unmarketable; it being presumed that in fixing the purchase price the existence of such an easement was considered by the parties. (Hornbeck v. Smith, 78.)

Vendor and Purchaser—Rescission—Burden of Proof—Fraud.

3. Where the purchaser sought to rescind a contract to purchase real estate on the grounds of fraudulent representations, he had the burden of pleading and proving all the operative elements of fraud. (Hornbeck v. Smith, 78.)

Vendor and Purchaser—Rescission—Duties of Parties.

4. A vendee desiring a rescission of a contract to purchase land must endeavor to restore the *status quo*, and to make some recompense for profits derived under the contract. (Hornbeck v. Smith, 78.)

Vendor and Purchaser—Time for Rescission.

5. In order to secure a rescission of a contract to purchase land, the vendee must act promptly upon discovery of the alleged discrepancy in the number of acres actually conveyed. (Hornbeck v. Smith, 78.)

Vendor and Purchaser—Rescission—Mistake.

6. If an innocent and mutual mistake was made by the defendant and plaintiff, the mistake being without negligence or fault on the part of plaintiff, and so material that if the truth had been known to the parties, the agreement for the sale of land would not have been entered into, that is sufficient to justify a rescission of the contract. (Jackman v. Northwestern Trust Co., 209.)

Vendor and Purchaser—Rescission—Mistake.

7. Where officer of vendor corporation went with plaintiff's agent and pointed out certain land as included in the tract to be sold, and such representation induced the sale, and was relied on, when such land was not included, the purchaser could rescind. (Jackman v. Northwestern Trust Co., 209.)

See Fraud, 2.

VERDICT.

See Trial, 2.

Directed Verdict upon Uncontroverted Evidence.

See Trial, 1.

WAGES.

See Master and Servant, 12.

WAIVER.

See Homestead, 5.
See Judgment, 5.
See Landlord and Tenant, 1.
See Trial, 7, 9.

WASTE.

Waste—Injunction.

1. A suit in equity will lie to restrain waste. (Barnes v. Esch, 1.)

WATERS AND WATERCOURSES.

Waters and Watercourses—Irrigation Districts—Organization—Bond Issue—Approval of Court—Statutes.

1. Under Title XLI, Chapter VII, L. O. L., as amended by legislative acts, providing for the organization of irrigation districts, the

issuing and sale of bonds of said district, and by authority of Chapter 357, page 773, Section 41, Laws 1917, allowing special proceedings in the Circuit Court of the county in which the office of such district is located, for the purpose of having a judicial examination and judgment of the court as to the regularity and legality of the proceedings of the board of directors of said district providing for and authorizing the issue and sale of bonds of said district, record examined and *held*, that the organization and existence of said irrigation district and the validity of the bonds it proposes to issue are regular in all respects and is therefore approved. (In re Grants Pass Irr. Dist., 643.)

Waters and Watercourses—Use of Water for Irrigation—Rights—Determination.

2. In suit to establish relative rights to use of water for irrigation, whether a party's interest wholly coincides with that of plaintiffs or defendants is not very important, since a decree applicable to rights of each should be rendered where justified by pleadings and evidence. (Thomas v. Thruston, 650.)

WIDOW'S PENSION.

See Infants, 1.

WILLS.

Wills—Testamentary Capacity—Burden of Proof.

1. The burden of proof was on proponent to establish the testamentary capacity of deceased by a preponderance of testimony. (King v. Tonsing, 236.)

Wills—Testamentary Incapacity—Sufficiency of Evidence.

2. In proceedings to probate a will, evidence *held* to sustain a finding of testamentary incapacity. (King v. Tonsing, 236.)

Wills—Setting Aside Probate—Issues and Proof.

3. In a proceeding to set aside the probate of a will, a petition, alleging that the instrument admitted to probate was not the last will and testament of the decedent, was sufficient to permit the admission of evidence of the existence of a later will revoking the one admitted to probate. (Melhase v. Melhase, 590.)

Wills—Lost Wills—Parol Evidence.

4. In a proceeding to set aside the probate of a will, evidence of the execution and contents of a later lost will, so far as they could be reproduced from the memory of witnesses cognizant of the circumstances, was admissible to show that it superseded and revoked the will admitted to probate; there being no attempt to probate the lost will. (Melhase v. Melhase, 590.)

Wills—Revocation by Subsequent Lost Will—Sufficiency of Evidence.

5. In a proceeding to set aside the probate of a will, evidence *held* sufficient to show that the testator made a later will revoking the one probated, which was lost or suppressed. (Melhase v. Melhase, 590.)

Wills—Revocation by Subsequent Lost Will—Sufficiency of Evidence.

6. In a proceeding to set aside the probate of a will, it was not necessary for the petitioner to prove the whole substance of a later

lost will, and it was sufficient that she clearly established the fact that a later will was made, and that it revoked prior wills. (Melhase v. Melhase, 590.)

WITNESSES.

Witnesses—Attendance Outside of County—Mileage.

1. Under Section 3145, L. O. L., entitling witnesses to mileage at the rate of 10 cents a mile in going to and returning from the place of service except in counties of 50,000 inhabitants, where the rate is fixed at 5 cents, a witness from a county of the first class, attending court in a county of the latter class by order of the court, would be entitled to double mileage at the rate of 5 cents only. (City of Seaside v. Oregon Surety & Casualty Co., 624.)

See Constitutional Law, 5.

WORDS AND PHRASES.

Words and Phrases—"Consideration"—"Price."

1. "Price" and "consideration" should not be confounded, for, though sometimes the same, they are not always identical. (The Oregon Home Builders v. Crowley, 517.)

"Accidental means"—See Kendall v. Travelers' Protective Assn., 179.
"After my death"—See Dieckman v. Jaeger, 392.
"Boycott"—See Hall v. Johnson, 21.
"Consideration"—See The Oregon Home Builders v. Crowley, 517.
"Conspiracy to injure trade, business or commerce"—See Hall v. Johnson, 21.
"Enacting clause"—See City of Astoria v. Malone, 88.
"Estoppel *in pais*"—See Depot Realty Syndicate v. Enterprise Brewing Co., 560.
"Execution of writing"—See Archambeau v. Edmunson, 476.
"Impossible"—See Learned v. Holbrook, 576.
"In case of my death"—See Dieckman v. Jaeger, 392.
"Indictment"—See City of Astoria v. Malone, 88.
"Labor and material"—See Multnomah County v. United States F. & G. Co., 198.
"One lot"—See Watson v. Hurlburt, 297.
"Pending"—Oregon-Wash. R. & N. Co. v. Reed, 398.
"Picketing"—See Hall v. Johnson, 21.
"Preamble"—See City of Astoria v. Malone, 88.
"Price"—See The Oregon Home Builders v. Crowley, 517.
"Proceedings *in rem*"—See Matlock v. Matlock, 307.
"Ratification"—See Depot Realty Syndicate v. Enterprise Brewing Co., 560.
"Strikes"—See Hall v. Johnson, 21.
"Subject matter"—See Matlock v. Matlock, 307.
"Unlawfully"—See City of Astoria v. Malone, 88.

WORK AND LABOR.

Action for Wages.

See Master and Servant, 12.